[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 855

CLIFFORD M. DAVIS, PETITIONER,

vs.

VIRGINIAN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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of the second metatarsal bone of the left foot. Plaintiff's injuries were caused by the negligence of the defendant, its servants, agents, and employees.

Fourth: That by reason of the aforesaid injuries plaintiff has and will suffer physical and mental pain and anguish, loss of earnings, and will expend various sums for medical care causing the plaintiff damages in the amount of Twenty Five Thousand ($25,000.00) Dollars.

Second Cause of Action

Plaintiff realleges each and every allegation contained in the articles above, and for a second cause of action states as follows:

[fol. 5] Fifth: Plaintiff's duties as a yard conductor requires him to run alongside of moving freight cars, to jump on to said cars, to jump off of said cars incident to effecting various train and switching movements.

Sixth: Immediately following the plaintiff's aforesaid injury he was seen by Dr. Southgate Leigh, a physician retained by the defendant. On or about July 22nd the aforesaid physician released the plaintiff, at which time the said physician negligently certified that the plaintiff was physically fit to return to his duties of yard conductor, when as a matter of fact the fracture of the second metatarsal of the plaintiff's left foot was then unhealed, and has remained unhealed. As a direct result of the defendant's aforesaid physician certifying that plaintiff was fit for work, he was caused to return to work and suffered pain, aches and swelling of his left foot as he attempted to carry out his duties with the aforesaid fracture still unhealed.

Seventh: As a direct result of the negligence of the defendant's physician as aforesaid plaintiff was caused to suffer damages in the amount of Ten Thousand ($10,000.00) Dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of Thirty Five Thousand ($35,000.00) Dollars, and costs.

Clifford M. Davis, By Henry E. Howell, Jr. of Counsel.

Jett, Sykes & Howell, 701 Citizens Bank Building, Norfolk, Virginia, Attorneys for Plaintiff.

[fols. 6-10] [File endorsement omitted]

PROOF OF SERVICE (omitted in printing)

[fol. 11] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK, VIRGINIA

[Title omitted]

BILL OF PARTICULARS—Filed December 2, 1957

In reply to the defendant's motion for a bill of particulars setting forth the acts of negligence of the defendant upon which the plaintiff relies states as follows:

* * * * * * *

[fol. 12-13] Fifth: Plaintiff has not had an opportunity to inspect the condition of the freight car from which he fell as the car has been exclusively in the possession of others since the date of the plaintiff's injury and therefore, plaintiff is unable to state whether or not the rungs of the freight car from which his foot slipped contained grease or were bent so as to contribute to the plaintiff's fall.

Clifford M. Davis, By Henry E. Howell, Of Counsel.

Jett, Sykes & Howell, 701 Citizens Bank Building, Norfolk 10, Virginia, Counsel for plaintiff.

CERTIFICATE OF SERVICE (omitted in printing)

[fols. 14-21] IN THE CIRCUIT COURT OF THE CITY OF NORFOLK, VIRGINIA

JUDGMENT—February 17, 1958

This day came again the parties, by counsel, and thereupon came the jury sworn herein on the 14th day of February, in the year, 1958, and having fully heard said plain-

tiff's evidence upon the motion of said defendant, by counsel, it is ordered that said plaintiff's evidence be stricken out, the members of the jury discharged and summary judgment entered for the defendant, to which action of the Court said plaintiff, by counsel, duly excepted. Whereupon it is considered by the Court that said plaintiff take nothing by his suit herein and that said defendant go hence without day and recover against said plaintiff its costs about its defense in this behalf expended, to which action of the Court said plaintiff, by counsel, duly excepted.

[fol. 22] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK, VIRGINIA

At law

CLIFFORD M. DAVIS, Plaintiff,

v.

VIRGINIAN RAILWAY COMPANY, a Corporation, Union Depot Building, East Main Street, Norfolk Virginia, Defendant.

NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS—Filed April 10, 1958

NOTICE OF APPEAL

The plaintiff, Clifford M. Davis, hereby gives notice of his intention to apply to the Supreme Court of Appeals of Virginia for a writ of error to a judgment heretofore entered by the Court in favor of the defendant in this action.

ASSIGNMENT OF ERRORS

1. The Court erred in striking the plaintiff's evidence and entering summary judgment for the defendant with respect to the first cause of action as set out in the Motion for Judgment filed herein.

2. The Court erred in striking the plaintiff's evidence and entering summary judgment for the defendant with respect to the second cause of action as set out in the Motion for Judgment filed herein.

• • • • • • •

[fol. 23] Clifford M. Davis, By Henry E. Howell, Jr., Of Counsel.

Henry E. Howell, Jr., Guy E. Daugherty, Jett, Sykes & Howell, Pq., 701 Citizens Bank Building, Norfolk, Virginia, Attorneys for the Plaintiff.

Certificate of Service (omitted in printing)

[fols. 1-2] IN THE CIRCUIT COURT OF THE CITY OF NORFOLK, VIRGINIA

CLIFFORD M. DAVIS, Plaintiff,

vs

VIRGINIAN RAILWAY COMPANY, Defendant

Transcript of Testimony

Stenographic transcript of the testimony introduced and proceedings had upon the trial of the above-entitled case, in said court, on the 14th and 17th days of February, 1958, before the Honorable Clyde H. Jacob, Judge of said court, and a jury.

APPEARANCES:

Messrs. Jett, Sykes & Howell (by Mr. Henry E. Howell, Jr., and Mr. Guy E. Daugherty), Attorneys for the plaintiff.

Messrs. Williams, Cocke, Worrell & Kelly (by Mr. Leigh D. Williams and Mr. Thomas R. McNamara), Attorneys for the defendant.

* * * * * * *

[fols. 3-8] J. M. GOODWIN, called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined By Mr. Howell:

Q. You are Mr. J. M. Goodwin?

A. That is right.

[fol. 9] Q. What position do you hold with the Virginian Railway Company?

A. General Claim Agent.

Q. State in detail your duties as General Claim Agent.

A. Oh, I look after personal injury claims, freight claims, stock claims, fire claims, supervise an investigation, settlement of it.

Q. Is it one of your duties to select the company physician?

A. He works—he reports to the Claim Department, to me, yes, sir.

Q. And is it your duty to select him?

A. Yes.

Q. Or make recommendations?

A. That is right.

Q. And as Claim Agent of the Virginian Railway Company, what if anything did you have to do with the employment of Dr. Southgate Leigh, Jr.?

A. I recommended his employment.

• • • • • • •

[fol. 10] A. We—it was just agreed as to what he would be paid, a monthly stipend.

• • • • • • •

Q. As Claim Agent, did you issue any instruction to other people in the employment of the Virginian with respect to taking injured employees to Dr. Southgate Leigh?

A. No, sir.

Q. You never have said anything to anybody about what is to be done with injured employees?

A. I have said things. I have never issued instructions.

[fol. 11] Q. What have you told them orally?

A. Well, we ask the employees to go to our company doctor for treatment, if they choose to go to a company doctor. It they want to go to their own doctor, they may do so.

Q. For example, do you give instructions to superior employees, have you given oral instructions to them that when a person is hurt to take them to Dr. Southgate Leigh?

A. No. I don't do that directly. It is just kind of a general understanding and it is a part of the rules.

Q. It is a rule that when a superior employee finds that a subordinate employee has been hurt, the superior should take the subordinate employee to Dr. Southgate Leigh?

A. If he wants to go, yes, sir.

Q. For the treatment of the injured employee, does the Virginian pay? Does the Virginian see that Dr. Leigh is paid for what treatment he gives the injured employee?

A. No. We pay him a monthly stipend to take care of such employees that come to him for treatment.

Q. Well, he is paid by the Virginian for such treatment as he gives to the injured employee?

A. Yes.

* * * * * * *

[fol. 12] Cross-examination.

By Mr. McNamara:

Q. Mr. Goodwin, do you or does anyone in your railroad direct Dr. Leigh as to what days he shall receive patients or what hours he should keep?

A. No, sir, we do not.

* * * * * * *

Q. Mr. Goodwin, does Dr. Leigh have his offices on the premises of the Virginian Railway Company?

* * * * * * *

A. No. He——

[fol. 13] Q. Do you know where his office is?

A. Yes, sir.

Q. Where?

A. On Botetourt Street; the number here, 712 Botetourt Street, Norfolk, Virginia (examining document).

Q. Are those premises in any way controlled by, subject to the Virginian Railway Company or its authorities?

A. No, sir, it is not.

Q. Do you pay the rent or anything of that nature?

A. No, sir.

Q. Do you have any of your employees there working with Dr. Leigh?

A. No, sir.

Q. Do you exercise any control over the manner in which Dr. Leigh treats anybody, any of your employees who go to him?

A. No, sir. We do not.

* * * * * * *

[fol. 14] Redirect examination.

By Mr. Howell:

Q. Mr. Goodwin, does Dr. Leigh send you a copy or does he call you relative to what treatment he has given an injured railroad employee?

A. He sends me a report.

• • • • • • •

[fols. 15-17] Q. You have found it to be the custom that a private doctor will not talk about his patient without his patient's request, isn't that——

A. That is true in many cases.

• • • • • • •

[fol. 18] Recross-examination.

By Mr. McNamara:

• • • • • • •

[fol. 19] Q. Will you state how many, if any, you employed other than Dr. Leigh?

A. We have Dr. Floyd, who is assistant to Dr. Leigh here in Norfolk. We have Dr. Irvin and Dr. Saunders in Roanoke. We have Dr. Holroyd and Dr. Todd at Princeton, West Virginia. And we have Dr. Merriman at Welch, West Virginia; and we have Dr. Steele, in Mullens, West Virginia.

Q. They are under the same arrangement as Dr. Leigh?

A. Yes, sir.

• • • • • • •

[fol. 20] CLIFFORD M. DAVIS, the plaintiff, having been first duly sworn, testified as follows:

Examined By Mr. Howell:

* * * * * * *

[fol. 21] Q. Can you tell me approximately what month and year you were first assigned to act as a yard conductor for setting up the Ford plant for the Virginian Railway?

A. Well, that I was assigned regular to the job, June 1st.

Q. Of 1957?

[fol. 22] A. 1957.

* * * * * * *

By the Court:

Q. Did you receive any instructions, and from whom?

A. Well, first instructions I received from the Ford Motor Company, Transportation Department, and I believe it was the General Yardmaster of the railroad.

By Mr. Howell:

Q. Let's not concern ourselves with the Ford Motor Company for the time being. Directing your attention to the instructions that you obtained from this officer, what did you say his position was?

A. General Yardmaster.

Q. What instructions did the General Yardmaster for the Virginian Railway Company give to you?

A. My instructions was to line up those cars there for [fol. 23] Ford Motor Company while they are at lunch.

Q. While they are at lunch?

A. Yes, sir.

Q. Did you ascertain how long that lunch period lasted at the Ford plant?

A. Yes, sir.

Q. How long did it last?

A. 30 minutes.

* * * * * * *

[fol. 24] By Mr. Howell:

Q. Now, I do not know and I don't know how many members of the jury may know. Tell us what you mean by a setup list; explain it to us.

A. Well, I—what I mean by a setup list is spots. I got to line those cars up, to go to spots inside that house.

Q. How many spots were designated on that setup list for July 3, 1957, for the morning shift?

A. I think it is 22 of them.

* * * * * * *

[fol. 25] Q. With reference to Plaintiff's Exhibit 3, which you have referred to as a pull list, what do you mean by pull list?

A. Well, there is cars in there that they have already—that they had unloaded on a previous setup, and there is empties in there I have got to switch out, and there is loads I have got to cut back into the house at different spots, and so forth.

Q. All right, Mr. Davis. At eleven o'clock you as yard conductor would—how many men did you have assisting you?

A. Two.

* * * * * * *

[fol. 26] Q. Had Pennington ever had any experience, to your knowledge, working in the house spotting cars?

A. No, sir.

The Court: I gathered the principle he is pursuing from the opening statement. Inexperienced or experienced, what casual connection is there between the efficiency or inefficiency of Pennington and this man falling down [fol. 27] the ladder?

Mr. Howell: It has this to do with it, your Honor. It required this man to do one and a half or two jobs where he was only required by law to do one. They put him in a position where he would not have been except for the inexperience of Mr. Pennington.

The Court: Suppose Mr. Pennington had been the greatest expert known in the railroad business in that field, wouldn't this accident still have happened?

Mr. Howell: No, sir, because this gentleman would not have been on top of the car. He could have given his signals and operations standing on the ground.

The Court: Go ahead. We will get along; let him say neither one of them was experienced if he wants to.

Mr. Howell: You overrule the——

The Court: Yes; go ahead; save time.

By Mr. Howell:

Q. Mr. Davis, what was the scope of your duties as yard conductor?

A. My duties was to receive these lists and line up cars, out there in the yard and instruct my brakemen with the movements and in assisting me.

Q. Who is supposed to carry out the job of spotting the cars as they head into the house?

A. The brakeman.

[fols. 28-34] Q. And who would that be in this case?

A. It would have been Mr. Pennington.

* * * * * * *

Q. All right. How many cars are you working with, altogether, on July 3, 1957, commencing at 11:00 A.M. in the morning?

A. (Witness counting) 43 cars.

[fol. 35] Q. When you had experienced brakemen working with you, when you have reached the point where the cars are being moved in, pushed into the house to be spotted, where do you stand? Where is your position?

A. My position is right—right along—let's see, where does that road cross—right along here. No, right along in here. Let's see. It would be right through here (indicating).

* * * * * * *

[fol. 36] Q. That is where you normally stand. Now, on this morning had Pennington informed you that he did not know how to spot cars once they entered into the house?

A. Yes, he did.

Q. What did you have to do in view of his inability to spot the cars?

A. Well, I had to—I told him, I said, "Well, I will get, kick these first bunch off to you. You look out for them. When I get this bunch in there, I will come on down from the rear and help you." To be able to do that, I had to be up on top. I was on top of this car right here, passing signals to Mr. Fulp.

* * * * * * *

[fol. 37-38] Q. Mr. Davis, if Pennington had known how to spot the house, where would you have taken your stand?

A. I would have taken my stand about maybe on the cab, which would have been to the engine, beside the engine or couple of cars from the engine, somewhere along the side of the cars.

* * * * * * *

[fol. 39] Q. What did you do after you got up on the ladder?

A. I climb across—I walked across these cars, nine cars here, until I come to a gondola, and I had to get down to be able——

Q. Why did you have to get down?

A. Because I could not cross those gondolas. And I had——

* * * * * * *

[fol. 40] A. I was going to get down and go through to rush on—well, more or less rush to the end car where Pennington was.

* * * * * * *

Q. What happened to you, if anything, as you attempted to descend this particular freight car to get past the gondola, to get back up on the next freight car to assist Pennington?

A. Repeat that again.

Q. What happened to you as you went down this car?

A. Well, I slipped, my feet slid out from under me and I——

Q. Where were you when that happened? Were you on the ladder or where?

[fol. 41] A. I was starting down the ladder.

Q. What rung were your feet on, would you estimate? How far down the ladder had you gotten?

A. I would say the second or third rung.

Q. All right, sir. Now, I want to direct your attention; are you familiar with the condition of the ground immediately adjacent to the track in this area where you were at this moment on July 3, 1957?

A. Yes, I am.

Q. You may take the stand. (The witness had been standing before a table, at a plat, before the jury.) Mr. Davis, describe if you will what the condition of that ground immediately adjacent to the track was.

A. Well, the shape of the track, the bank—it was—it comes into, goes like down in a little hollow like.

Q. What would be the angle of incline of the ground towards the track, to the best of your estimation?

A. I would say a 45-degree angle.

* * * * * * *

Q. Was there an ballast on the slope, though?

A. No. I don't believe there was but it was a piece of [fol. 42] pipe there, I know.

The Court: He is ~~your~~ witness. Let him describe it.

By ~~Mr.~~ Howell:

Q. Where did you land when you came off the car?

A. I landed sort of frontwards.

Q. What do you mean "frontwards"?

A. Well, I, you know just banged like that and rolled under the car.

Q. At what angle did your feet make contact with the ground?

A. Feet, toes—toes down, like that.

Q. Did you feel anything at the time that your toes made contact with that slope?

A. Yes, sir.

Q. What?

A. I felt my bones shaking.

* * * * * * *

By Mr. Howell:

Q. Had the cars come practically to—what was the [fol. 43] condition of the car by the time you actually struck the ground?

A. It was stopped.

* * * * * * *

[fol. 44] By Mr. Howell:

Q. Now, Mr. Davis, what is this main switching yard of the Virginian called? Is that Sewells Point switching yard?

A. Yes, sir.

Q. Have you worked the Sewells Point switching yard before?

A. Yes, sir.

Q. What is the condition of the right of way in Sewells Point? Do they have level or sloping——

A. They have level walkways.

Q. What is the purpose of a right of way with respect to its use by a brakeman or yard conductor?

A. Well, the purpose is for trainmen to get up and off, down off moving trains.

* * * * * * *

[fol. 45] Q. What happened to your foot, if anything?

[fol. 46] A. It swollen so I couldn't put my shoe on.

Q. Did any other part of your body hurt you at this time?

A. Yes, sir, my knees.

Q. Your knees?

A. Yes, sir.

Q. What happened to your knees when you fell?

A. They just cracked.

Q. Did they make contact with the ground?

A. Yes, sir.

Q. Which angle was this 45-degree slope? Which way was it angling?

A. Toward the cars; toward the track, adjacent to the track.

Q. If you had a flat surface, would you have had any trouble landing on your feet in a safe manner?

Mr. Williams: I object, your honor.

The Court: Objection sustained.

Mr. Howell: Note our exception.
The Court: Exception noted.

. . . . . .

[fol. 47] By Mr. Howell:

Q. When you reached Sewells Point, what took place, if anything?

A. I was helped off the cab there and was assisted by Mr. Fox to go see Dr. Southgate Leigh.

Q. Mr. Fox took you to see Dr. Southgate Leigh?

A. Yes, sir.

Q. Did you ask to go see Dr. Leigh? Did you choose him yourself?

A. No, sir.

. . . . . .

[fol. 48-49] By Mr. Howell:

Q. How was your foot feeling at this time?

A. Well, it was aching so bad that I felt faint.

Q. Going back, what did Dr. Leigh do in the way of treatment?

A. Wrapped a piece of tape around my foot.

Q. Did he give you any crutches?

A. No, sir.

Q. Did he give you any arch support?

A. No, sir.

Q. Any special shoe?

A. No, sir.

Q. Did he give you any sedative of any sort?

A. No, sir.

. . . . . .

[fol. 50] A. The second trip. The second trip I went back to Dr. Southgate Leigh and I was—went in on crutches. Bobby——

Q. Where did you get the crutches from?

A. At home.

Q. All right. Then what took place?

A. So we went—went in and the nurse put me in a room down there and told me that Dr. Leigh would see me in a

few minutes. So I went in one of those little offices, room back there, patient's room, and he come in there and he saw me on crutches and he started raising a big roar about me being on crutches.

Q. What did he say about you being on crutches?

A. He told me that was the worst thing I could do was to be on crutches.

Q. Why had you gotten on crutches?

A. Because it was paining me so bad I could not go to [fol. 51-52] that office without them.

Q. All right. Now, what did you tell Dr. Leigh?

A. I told him that I couldn't walk on my foot. He said, "Don't give me that. You can walk on this. It is the only way it is going to heal you, is to walk on them."

• • • • • • •

Q. Did Dr. Southgate Leigh ever X-ray your foot after that first X-ray?

A. No.

• • • • • • •

[fols. 53-55] By Mr. Howell:

Q. All right. Mr. Davis, you are going to have to hold your voice up a little louder. After this conversation—and don't refer to it—this conversation with Mr. Carraway, did you go back to see Southgate Leigh for the last time?

A. Yes, sir.

Q. What did Southgate Leigh say to you, if anything?

A. He told me that I was all right to go back to work.

• • • • • • •

[fols. 56-57] By Mr. Howell:

Q. How long did you stay off from work after going to see Dr. Thiemeyer?

A. One month.

• • • • • • •

[fol. 58] Q. Mr. Davis, how many brakemen, in your opinion, should have been assigned to you to carry out the Ford plant switching operation, considering the number

of cars and the nature of the maneuver and the type of personnel, the other two men, the type of experience they had had; how many men do you think you should have had to have conducted this operation in a reasonably safe manner?

A. Well, for me to be able to carry out the job like it should have been, I would say three brakemen.

Q. How much time should be allowed for a switching operation considering the number of cars and the number of spots that had to be effected in the house on July 3, 1957, in the morning thereof? How much time?

A. I would say operation like that should take about an hour—should have about an hour, hour and a half, for that operation.

• • • • • • •

By The Court:

Q. Before counsel for the defendant cross examines, the Court would like to know something about this. You came down a metal ladder, iron ladder or wooden ladder?

A. Metal ladder.

Q. You say you put your feet on the second round from the top?

[fols. 59-61] A. Yes.

Q. How far was that from the ground?

A. That was fifteen, ten or fifteen feet.

Q. When you put your feet on the second round, what did you do with your hands, if anything?

A. I had my hands on the top round.

Q. When your feet slipped off, according to your testimony, the second round—

A. A-hum.

Q. —did you turn loose from the hold you had on the ladder with your hands?

A. Pulled loose.

Q. What caused you to fall off that ladder?

A. It is—it might have been grease or anything on my shoe.

Q. It might have been; you don't know what caused it?

A. It is what—something caused slip out from my foot.

• • • • • • •

[fol. 62] By Mr. Howell:

Now, my question: How far was the ladder away from the side of the car. You understand my question?

A. Yes, sir.

Q. How far?

A. Approximately three to four inches.

Q. And what is the diameter of the rungs of the ladder?

A. Oh, I would say a quarter of an inch.

Q. What is the shape of the rung?

A. It is round.

[fol. 63] By the Court:

Q. You say a quarter of an inch?

Mr. Howell: A quarter of an inch in diameter

A. Diameter round.

Mr. Howell: About as big as your finger, Judge.

Mr. McNamara: —finger is bigger than a quarter of an inch.

Mr. Howell: Mr. McNamara, if you have any comments address them to the Court. I can't hear you while you are laughing.

Mr. McNamara: I said my finger's measurements are bigger than the Court's.

Mr. Howell: That is something we can get a caliper and find out.

The Court: I don't think a little baby's fingers are more than a quarter of an inch in diameter, the smallest kind of newborn baby.

The Witness: What I——

By Mr. Howell:

Q. Mr. Davis, can you approximate the distance between the rung that you had your hands on and the rung that you had your feet on, at the time that you fell?

A. Approximately three feet.

Q. And what was the shape of your body?

A. My — was in more or less a U-shape.

[fol. 64] Q. Is that the normal, customary position in using this type of ladder?

A. It sure is, yes, sir.

Mr. Howell: Answer Mr. McNamara or Mr. Williams, either one.

Cross-examination.

By Mr. McNamara:

Q. Mr. Davis, when you first started to answer questions for Mr. Howell, you referred to certain instructions you said you had been given by somebody over you. You named his position but you didn't give his name. Can you tell me what his position was? A yardmaster, was that correct?

A. He was I think at the time he was General Yardmaster.

Q. General Yardmaster? Who was he?

A. Mr. Carter.

Q. Who?

A. C. G. Carter.

Q. When did he give you these instructions?

A. It was the first work day of August on that job.

Q. The first work day of August?

A. Yes, sir.

Q. In 1957?

A. Yes, sir.

Q. That was a month or so after this accident?

A. Yes, sir—before the accident.

[fol. 65] Q. The first of August, 1957?

A. July—it was June that I took the job.

Q. I didn't ask you when you took the job, I asked you when you——

Mr. Howell: A little louder. I have trouble understanding you.

By Mr. McNamara:

Q. Regardless of when you "cut" the job, whatever that means, you received these instructions from Mr. G. C. Carter in August 1957, is that correct or not?

A. No, sir.

Q. It is not correct? You are going to change that, then?

A. Well, I got my months mixed up.

Q. When was it?

A. June.

Q. June of 1957. Where were you when he gave you these instructions?

A. It was coming out of the building at the Ford Motor plant.

Q. You were over there?

A. With him, getting the list, the pull list, the switching list.

Q. And he did not tell you to do this job within any particular limit of time, regardless of safety precautions, [fol. 66] did he?

A. He told me that "You have got this list at eleven o'clock, the pull list, and you have got a list here for eleven—for eleven-thirty"; says "That is the time that you have got to have this house—this house should be set up for the Ford Motor Company."

Q. He didn't tell you that if it meant you had to operate without safety in order to meet that schedule, you still had to meet it?

Mr. Howell: It is not what he didn't tell him, it is what he told him.

The Court: The witness is on cross examination. Great latitude is permitted.

By Mr. McNamara:

Q. He did not tell you that you had to meet that schedule even if it meant for you to abandon safety precautions, did he?

A. No, sir.

Q. No, he did not. And it is your job to do whatever your operation is and at the same time to observe safety precautions for yourself and for your men, isn't it?

A. Will you repeat that again?

Q. It is always your job, no matter what you are doing, to observe safety precautions for yourself and for your men, is it not?

[fol. 67] A. Yes, sir.

Q. And when you are assigned to do a particular task, that assignment means you do that task while observing your safety precautions, does it not?

A. You have got to work as rapidly as you can and try to be safe while you are doing it.

Q. And try to be safe while you are doing it. And if you reach a point where it is necessary to abandon safety in order to do a certain thing by a certain time, you just have to go slower, don't you?

A. Yes, sir.

Q. Nobody from the Virginian Railway, Mr. G. C. Carter or anybody else, had ever told you to abandon any safety precautions in order to meet that schedule at the Ford plant by a certain time, had they?

. . . . . .

[fol. 68] A. I can't say yes or no.

Q. Why can't you?

A. For the simple reason because the man gave me the list and he knows that the job cannot be done in 30 [fol. 69] minutes, and instructed me that, how that job is to be set up.

Q. He did not tell you to do it in a certain time if it meant you had to do it in an unsafe manner, did he?

A. He meant for me to do it by 30 minutes.

Q. I didn't ask you what he meant, I asked you what he said.

. . . . . .

Q. Told you to do it in a certain time?

A. Yes, sir.

. . . . . .

[fol. 70] A. He gave me that list and instructed me that the job was to be done in 30 minutes while the Ford men are at lunch. That was breaking a safety rule, telling me that the job is to be done in 30 minutes.

. . . . . .

Q. You have never been told to abandon safety precautions by anybody of the Virginian Railway, have you?

A. Speaking plain out, no, sir.

. . . . . .

Q. You were in charge of that job over there on July
[fol. 71] 3, 1957, weren't you?

A. Yes, sir.

Q. You were the top man from the Virginian Railway on that job at that time?

A. Yes, sir.

Q. You had charge?

A. Yes, sir.

Q. It was up to you as to how fast or how slow the job was carried out, was it not?

A. It was up to me to see the Ford plant was set up.

Q. All right. It was up to you to give orders to the engineers as to what cars to pick up, where to take them, where to put them?

A. To the brakemen.

Q. And those brakemen were directly under you and so was everybody else out there that had anything else to do with the Virginian, were they not?

A. I wouldn't say that, no, sir.

Q. Who was out there that were not under you?

A. They were out there, men out there over me.

Q. Who?

A. Well, it was Mr. Carter has been there, Mr. Strickland has been there.

Q. I am talking about on that day.

A. On that day it wasn't nobody.

[fols. 72-73] Q. All right. Are you familiar with your company's safety rules?

A. Yes, sir.

* * * * * * *

[fol. 74] Q. What I want to know, how many cars were——

A. How many cars were they that was down there before I——

Q. That were on the house track.

A. Nine. Let's—about fourteen of them, I think.

Q. Fourteen cars there. How many cars did you have to get, altogether, in order to push them to the house?

A. I think it was close to 22 of them, altogether.

Q. That leaves eight cars then still to be gotten?

A. Yes, sir.

Q. At the time you got hurt?

A. (The witness nodded)

Q. Now, where were those eight cars? On the storage [fols. 75-78] track?

A. It was five of them coupled up to the engine and two of them on the storage track.

Q. Was the engine still in the process of getting those other two?

A. Yes, sir.

Q. The engine was not coupled to the cars that were on the house track, isn't that correct?

A. No, sir.

. . . . . .

[fol. 79] Q. In other words, you got on that car to ride, so you wouldn't have to walk?

A. While the car was rolling I walked, too.

Q. That was your reason for getting on the car?

A. Yes, sir.

Q. Because you didn't want to walk?

A. To be ahead of the cars.

. . . . . .

[fol. 80] The Court: The statement the jury heard, he got on the car rather than walk, and the witness——

By the Court:

Q. Your answer to that statement?

A. To be with the cars while they are going down to the house and walk on top of them.

By Mr. McNamara:

Q. You could have walked alongside of the cars instead of climbing up walking on top of them, couldn't you?

A. I would have had to run alongside of them. The cars were in motion.

Q. I believe you stated that they were going very, very slowly?

A. When I got off. That was approximately nine cars by the time I got that far. They had rolled nine car-lengths—I mean walked nine cars, with them rolling.

Q. Rather than walk along the right of way or run along the right of way, you chose to get on a moving car, climb up to the top of it and walk along the top of the cars while they were moving, is that correct?

[fol. 81] A. Yes, sir.

* * * * * * *

Q. You could have stayed on the ground in the first place, couldn't you?

A. I couldn't have.

Q. Why not?

A. Not and be able to assist my brakemen.

Q. What did you do on top of the cars that assisted your brakemen?

A. I was making my way; it was giving me progress to get to the rear of the train——

[fols. 82-84] Q. And the cars that were on this house track stopped before they ever got to the house, didn't they?

A. Do what?

Q. The cars that we are talking about, stopped before they ever got to the house, didn't they?

A. Before all of them got to the house.

Q. Yes. They stopped?

A. Before all of them. Some of them——

Q. You didn't have to run—well, the first one, the one that the brakeman Pennington was on or was near, stopped before it ever went into the house, didn't it?

A. I think it was right at the house, the car was.

Q. Before it went into the house, it stopped?

A. Yes, sir.

Q. And all the rest of the cars following it stopped?

A. (The witness nodded)

* * * * * * * *

[fol. 85] By Mr. McNamara:

Q. You wanted to be back there to help Pennington when the cars first started moving into the house, isn't that correct?

A. No, sir, when we started shoving in the house, is when I wanted to be back there.

Q. What is the difference between moving in the house and shoving in the house?

A. It is about 20 cars there I think difference. If I had to walk I would have had to walk them.

Q. That is not my question. The question is this: I want you to state whether or not this is correct, that you wanted to be there when the rear car started to go into the house and it was your purpose in being ther so that you could help Pennington when that started happening?

A. Yes, sir.

Q. All right. And it was at that point that you were going to start helping Pennington?

A. Not at that point, no.

Q. At what point did you start helping Pennington?

A. When we got them in there and got them stopped; [fol. 86] when we had shoved the cars all the way in the house, then I was going to assist in making the cuts at the different spots.

* * * * * * *

[fol. 87] Q. And since you have been a conductor you have climbed up and down on freight cars, haven't you?

A. It is according to what kind of position I have to be into, yes, sir.

Q. That is part of your duties as a conductor in running a switching operation; it requires you to be up on top of the cars at times, does it not?

A. At times.

* * * * * * *

[fol. 88] Q. You are thoroughly familiar with the ladders and grab-irons on freight cars which you use to climb up and climb down, are you not?

A. Yes, sir.

Q. As I understood your previous testimony, you said that at the moment you fell the cars were moving very slowly?

A. Yes, sir.

Q. So slowly that by the time you hit the ground, it was stopped?

A. Time I hit the ground, rolled down the bank, it had stopped.

Q. The fact of the matter is, the car was stopped when you fell down?

A. No, sir.

Q. How long did it take you to fall ten feet and hit the ground?

A. Well, I would say—I couldn't say that right off, [fols. 89-97] how long it would take.

Q. It wouldn't take you any longer than that (snapping fingers), would it?

A. It would take a little longer than that.

Q. That is the way you want to leave it?

A. Well, when I—I rolled, fell on this bank. When I fell off, I fell on the bank and rolled down the bank, down the side of the car.

Q. And the cars were stopped at that time?

A. They were just about stopped at the time. They were stopped.

Q. They were stopped?

A. Yes, sir.

* * * * * * *

[fols. 98-101] Redirect examination.

By Mr. Howell:

* * * * * * *

Q. Now, if Pennington had known how to perform the duties of spotting, which I understand is the duty of the senior brakeman, would you have had to have been up on top of those cars at the point where you fell?

A. No, I wouldn't.

* * * * * * *

[fols. 102-109] DR. JOHN S. THIEMEYER, JR., called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined by Mr. Daugherty:

* * * * * * *

[fol. 110] Q. When was that X-ray taken, Doctor?

A. This X-ray was taken on the 7th of August, 1957.

[fols. 111-112] Q. Did you advise Mr. Davis in regard to his returning to work?

A. The X-ray which I produced showed that there was still considerable evidence of fracture present. There was no evidence of it having filled in or healed. It was a month since his injury and I felt that he should not bear weight on this any more than is necessary such as going to the bathroom. I felt that he should rest. I felt that he should not work.

Q. Sir, with a fracture, is it your opinion, competent medical advice, to exercise the foot that has had a fracture within two or three days after it.

* * * * * * *

[fols. 113-114] The Court: The Court is now holding that there was not the relationship of employer-employee in this case. Where a fellow servant committed a tort, it is binding on the railroad. The Court so holds. You may dictate your exception.

* * * * * * *

[fol. 115] By Mr. Daugherty:

Q. All right. Dr. Thiemeyer, in your opinion is it proper treatment when a man has suffered a fracture such as you have seen in these X-rays: on the third, fourth or fifth day to tell the man to get off crutches and use his foot, this is the only way he can make it heal?

A. I don't think that is proper.

* * * * * * *

Q. What is the proper treatment of a fractured foot, Doctor, such as this fracture?

A. It is my opinion that a fracture should be immobilized until it is healed sufficiently to bear weight without jeopardy of its healing.

Q. Doctor, from examining the two sets of X-rays you have seen, taken approximately a month apart, would you be able to state in your opinion whether or not it would aggravate this injury to send him back to work before this month when this picture was taken, when he was sent back to work as revealed by your records?

A. I would say that activity would aggravate this fracture in that period.

[fols. 116-120] Q. What would it do to the healing process?

A. It would retard healing.

Mr. Daugherty: I think much of this is admissible. I am going over it. I think it flows together.

The Court: Do you want to examine him any more along that line?

Mr. Daugherty: Yes, sir. I want the jury to come in.

(Counsel conferred)

By Mr. Daugherty:

Q. Sir, when a man has suffered a fracture as revealed by an X-ray, is it customary to take a second X-ray before sending a man back to work, a second X-ray of the fractured area?

A. I would say that is acceptable procedure.

Q. Did you do so in this particular instance, sir?

A. I did.

Mr. Daugherty: I think that concludes the tender of proof.

The Court: Call the jury. Do you want to cross examine without waiving?

Mr. McNamara: No.

The Court: I think even nonprofessional people would agree with him on that.

* * * * * * *

[fol. 121] By Mr. Daugherty:

Q. Now, sir, the testimony from Mr. Davis is that when he fell—and I will attempt a sketch here to assist you (counsel at a blackboard)—he fell to the side of the boxcar and that when he did fall, he was on a ladder running down the side of the boxcar. This is a sectional [fol. 122] view. This would generally be through here; that his body was somewhat in a U-position and that when he fell, that the surface he fell on instead of being horizontal or flat like this floor, was inclined about 45 degrees, sloping down towards the track; and that when he fell, he came straight down, so that his feet were angled down this incline. Now, could you state, in view of your experience and training, whether falling on an inclined surface from this ten or fifteen feet, would make any difference, than in falling on a flat surface, as far as a fracture is concerned?

A. Force exerted on an obliquity usually offers more stress, more force, more——

Q. Where is that stress, sir?

A. Depending, of course, on the point of contact and the point of stress. But in this case, an oblique surface such as that would offer more stress at the site of fracture, of this man's fracture, than a straight, flat surface.

Q. Would it be in your opinion more probable that a fracture would occur on an inclined surface such as this, than on a horizontal surface?

A. Yes.

By the Court:

Q. Is it probable that a person of the weight of the plaintiff, falling fifteen feet on a flat surface, would likewise have fractures?

[fol. 123] A. Falling fifteen feet?

Q. Yes; on a flat surface.

A. On a flat surface?

Q. Yes.

Mr. Howell: You mean to the second metatarsal bone of that foot.

A. I couldn't say necessarily the second metatarsal, but I would say fracture would be very probable.

Mr. Howell: But your honor, in due deference to your honor's question——

The Court: The question was whether or not that would make any difference, whether it wouldn't have happened anyhow.

Mr. Howell: Your honor's question is very significant, but in due deference, if asked by an attorney would have to be whether or not it is probable that it would effect a fracture to the metatarsal bone. He might have broken his heel bone if he was on flat ground or he might not have. But this question is whether this slope probably effected the fracture to the metatarsal bone.

The Court: I understood him to say that on a flat surface he would still have a fracture.

Mr. Howell: But not——

The Witness: Not necessarily the second——

* * * * * * *

[fol. 124] By The Court:

Q. The other fracture would have been about the same?

A. The usual fracture that occurs in a straight fall of that height is one of the os calcis of the heel bone. With forward obliquity, the force is moved forward such that the fracture would occur such as this in the metatarsal.

* * * * * * *

[fols. 125-126] By Mr. Daugherty:

Q. Doctor, I am going to try to reframe this question. I want you to, first of all, consider Mr. Davis as an active railroad worker, engaged in switching cars, jumping from moving cars. Now, on this day when he fell, if he had fallen on a horizontal surface which was composed of dirt, covered with turf or grass—straight down, fifteen feet: do you think it would be probable that a fracture of the os calcis would occur?

A. I would like to say this, that I feel that his falling on an oblique surface would make him more prone to a fracture than falling on a flat surface.

Q. Right, sir.

* * * * * * *

[fols. 127-128] Cross-Examination.

By Mr. McNamara:

* * * * * * *

[fol. 129] Q. Doctor, I won't prolong it. I would like to ask you this: What bones are fractured or whether any fracture results from a fall depends largely on what part of the body hits the ground first, doesn't it?

A. That is one of the factors. The other factors would be angle, force.

Q. The angle of the individual falling, when he hits is every bit as significant as the angle of the ground that he hits, is it not?

A. That is correct.

* * * * * * *

[fol. 130] By Mr. McNamara:

Q. Would you say the probability, then, of the man's—in the hypothetical question put to you by Mr. Daugherty—the man's having broken his heel if the surface had been flat rather than having suffered the fracture where he did suffer it?

A. I didn't say that he would break his heel if he fell that distance. The Judge asked me if he fell from fifteen feet, what bone would be broken. With reference to that, I believe, I said that the bone most commonly broken when falling a high distance, falling on a straight surface, is the os calcis.

Q. That is the heel?

A. That is correct.

Q. That is a different, much more serious fracture than the metatarsal?

A. It is.

* * * * * * *

[fol. 131] L. G. WHITEHORNE, called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined By Mr. Howell:

Q. Mr Whitehorne, state your full name.
A. Leslie Gregg Whitehorne.
Q. Where do you live, Mr. Whitehorne?
A. 4724 Westview Street, Broad Creek Village.
Q. How old are you, sir?
A. 37.
Q. How long have you been engaged in railroad work?
A. Just a little under 13 years.
Q. How long have you been employed by the Virginian Railway Company?
A. For a little under 13 years.
Q. How many years' experience have you had as a brakeman?
A. Brakeman, conductor—all similar, same—little under 13 years.

* * * * * * *

[fol. 132] A. From that point to the house it gets pretty rough.
Q. It is pretty rough. Is it in a safe or unsafe condition at that area?

Mr. McNamara: I object to that, your honor. It calls for an opinion.

Mr. Howell: Your honor, this is expert testimony from [fols. 133-135] a witness who is——

The Court: He may describe the situation.

Mr. Howell: Judge, under the law this gentleman can give expert testimony. An expert can testify——

The Court: You are asking about the land adjacent to the tracks?

Mr. Howell: That is right; at the area where you approach the house.

The Court: And his position with the railroad is what?

Mr. Howell: He is an assistant yardmaster on the extra board for 13 years. He has been a brakeman and a conductor.

The Court: He has nothing to do with the installation of the railroad line or engineering?

Mr. Howell: No. What is more important, Judge, he has to use it. He has to use the right of way. And we are trying to find out with respect to a man who has been a brakeman for 13 years, if it is safe or unsafe.

The Court: He may testify as to what the situation is, whether it is covered with grass, sand or rocks or what not.

* * * * * * *

[fols. 136-139] By Mr. Howell:

A. (Continuing) Right in just before you get to the plant it is sloping right in. There is no walking place at all there.

By Mr. Howell:

Q. When you say the plant, where is that with relation to the house?

A. Just before you hit the little road that goes to the parking lot; I would say about 35, 40 yards.

Q. From the entrance to the house?

A. Yes, sir.

Mr. Howell: We have noted our exception with regard to this man being——

* * * * * * *

[fol. 140]. By The Court:

Q. How many people worked with you?

A. Two brakemen, fireman and engineer.

Q. Two brakemen, fireman and engineer. How long did it take you to unload?

Mr. Howell: Your honor, I should like to take over [fols. 141-142] on this point, if you don't mind.

The Court: Let him answer what you want to find out.

* * * * * * *

[fol. 143] By Mr. Howell:

Q. If you had inexperienced brakemen, particularly your senior brakeman, who is going to spot the house, what

effect would that have on the time that it would take to safely carry out their operation?

A. With two inexperienced brakemen, it is hard to do it safe at all.

Q. Does the conductor have any control over who the railroad will send to him as brakemen?

A. No, sir.

. . . . . .

[fols. 144-145] Cross-examination.

. . . . . .

[fol 146] By Mr. McNamara:

Q. Let me ask you this as an experienced conductor, then: Is it necessary on that job over there for a conductor working with two brakemen, ever to rush in such a way as unnecessarily to expose himself to danger?

A. It is two ways of looking at this thing, two ways of answering it. In order to try to satisfy the Ford plant, we do a little rushing. And with two unexperienced men—inexperienced men, it is a lot of difficulty and it puts a lot of work on the conductor. In fact, you have got to watch both men and try and protect himself, too. And that is—it really, it puts the conductor in the middle [fol. 147] when he has got two new brakemen.

Q. And that is when the conductor is trying to satisfy the people in the Ford plant?

A. That is right.

. . . . . .

By The Court:

Q. Are you ever required to do more than you would do to operate safely?

A. No, sir.

. . . . . .

[fol. 148] By Mr. McNamara:

Q. The conductor is over there with two brakemen, the fireman and the engineer; the conductor is in charge, is he not?

A. Yes, sir.

Q. It is up to him as to how fast or how slow the [fol. 149] operation moves, isn't that correct?

A. That is correct.

* * * * * * *

[fol. 150] Dr. Southgate Leigh, Jr., called as a witness on behalf of the plaintiff, and having been first duly sworn, [fol. 151] testified as follows:

Examined By Mr. Howell:

Q. You are Dr. Southgate Leigh?

A. Yes, sir.

Q. When were you first employed by the Virginian Railway?

A. I don't know. About '30 or '31.

* * * * * * *

A. Well, those that are off a certain length of time have to have an examination, yes, that type. Those that are not off a certain length of time do not have to have an [fols. 152-153] examination. That is what I meant.

Q. But for the Virginian Railway, you make recommendations as to whether the man is physically fit to work for the Virginian or not, is that right?

A. Yes.

Q. The employees that you examine for the Virginian Railway, do you expect to be paid by the employee?

A. No.

* * * * * * *

[fol. 154] Q. Have you ever had any conversation with Mr. Goodwin, sitting over here?

A. I talk to him every day, pretty near.

* * * * * * *

[fol. 155] Q. Give me the general pattern of a day's activities, how your work ties in with that of Mr. Goodwin.

A. Well, I call him about—find out what a man's specific

job is that he would have to do on going back to work. I call him about injuries. I call him about many different things or he calls me.

Q. Now, do you rely on Mr. Goodwin to advise you as to the general type of work that an injured employee has to do?

A. Do I get his advice on what the work is?

Q. Yes, sir, the nature of the work.

A. No. Most of that I get from the immediate employer, the one that is the boss.

Q. What did you ask Mr. Goodwin about his work?

A. He gets that information for me or tells me who to call and who to find out about it.

Q. What are some of the other types of relationships that you have with Mr. Goodwin?

A. About injuries; settling claims; how bad someone is hurt.

Q. Do you have to ask the employee whether you may talk to Mr. Goodwin about his case or do you feel that you can do that directly to Mr. Goodwin without consulting the employee?

A. I have been doing it for 25 years, 28 years.

* * * * * * *

[fol. 156] Q. Would you talk about what was wrong, what was not wrong, with a private patient, to some other party without first consulting the private patient?

A. Why would I talk to another party about it?

Q. They might call, want to know what is wrong with Mrs. Jones. Would you tell them?

A. No.

Q. All right. You don't hesitate to tell Mr. Goodwin what is wrong with an injured employee, do you?

A. Because he sent him to me to treat.

Q. All right. And you are paid by the Virginian Railway to treat the man?

A. Yes.

Q. And you are doing it within the scope of business [fols. 157-158] of the Virginian, so you feel that it is all right to tell the Virginian what you have done with respect to the man that——

A. I make a report. I make a report on every patient that comes in there, and send it to them, yes.

Q. You send that to Mr. Goodwin?

A. I—one copy of it goes to him, one goes to the superintendent, one goes to the employer, the immediate superior of each department.

Q. But you don't send any to the employee?

A. No.

Q. Now, what does the superintendent have to do with the injured person? Why do you send him a copy?

A. Well, if you were a superintendent of a railroad and you had a certain number of employees, and a man comes in, he wants to know how long before he is going to be back at work, this (indicating) contains that, whether he has to put somebody else in his job—all of those things.

Q. And the same practice applied to Mr. Clifford Davis's case as applies to any other of the Virginian employees that you treat during the course of a year?

A. Yes.

. . . . . .

[fols. 159-161] Q. Now, did you recommend that Mr. Davis stay off his feet?

A. No. I recommended that he use it.

. . . . . .

[fol. 162] Q. When Mr. Clifford Davis returned to you after the first visit, was he on crutches?

A. Yes.

Q. What did you tell him about the crutches?

A. Told him not use them.

. . . . . .

[fol. 163] Q. What is the system?

A. They have a regular blank, re-employment return-to-work blank, a complete examination; that is filled out when they have been off from work for a certain length of time. It isn't——

Q. What period?

A. I don't know.

Q. You don't know?

A. They send it to me and I fill them out.

Q. You mean you have been doing it for fifteen years and you don't know how long a period?

[fol. 164] A. No.

Q. You have no idea?

A. No, because they send the blank to me with the man, anybody they want to know about going back to work.

Q. I see. All right. Well, suppose you don't receive such a blank?

A. Don't receive?

Q. If you don't receive it, do you talk verbally with——

A. Oh yes; yes, they call me and ask me if this one is ready to go back to work, if this one is this and this one is that.

Q. They called you about Mr. Clifford Davis, didn't they?

A. I talked to someone about him. I think it was about the 20th, yes.

Q. And what did you tell them? First, whom did you talk to? Mr. Goodwin?

A. No.

Q. Whom did you talk to?

A. Talked to one of the men down at the roundhouse, someone down there.

Q. You don't know?

A. Don't know who it was.

Q. He was an employee of the Virginian Railway?

A. Yes.

[fol. 165] Q. Identified himself as such?

A. Yes.

Q. What did you tell him about whether Mr. Davis could go back to work or not?

A. I told him that I told Mr. Davis that if his work—I mean if he had something light for him to do, just so he wasn't climbing up and down cars, it would be good for his foot.

Q. It would be all right to stand on it for the most part of the day, just so he didn't do a lot of climbing?

A. That is right, but that I was to see him and check on him even before he did that.

Q. Are you sure you told the man that?

A. Told the man to come back to see me before he went back to work.

Q. Let me get that straight. You told this man down at the roundhouse that it would be all right for him to come back if he did light work?

A. That is right.

Q. And you told him that on or about the 20th?

A. I don't know what the date was. Now, whether it was a week later when he went down there or when, I have no record of that.

Q. Well, did the man send him back to you, to see you?

A. No, he didn't come back to see me.

[fol. 166] Q. Did you see him in August?

A. I saw him in August, yes.

Mr. McNamara: If it please the Court, this evidence has been introduced by Mr. Howell through his witness, Dr. Leigh, and Mr. Howell is now bound by it. I object to his cross examining Dr. Leigh on this matter any further. He has been leading with every question and I have not objected, and he has cross examined at every possible opportunity and I have not objected. I think he has just got——

The Court: The Doctor answered the last question that he asked. Proceed.

By Mr. Howell:

Q. What date did he come back to see you in August, Doctor? It is on the back there.

A. August 22nd.

Q. Did you consider him fit for work at that time?

A. Could find nothing wrong with his foot.

Q. Did you ever recommend any arch support or supportive shoe?

A. They—in this type of fracture, they weaken the arch. It is better not to do it; just wear a tight-fitting shoe.

Q. And the best thing to do in this type of fracture is to get back to work as quickly as possible?

[fol. 167] A. No; is to use your foot.

Q. And you recommend that around the railroad yard

as a good place to use it, just so long as you are not climbing boxcars?

A. That is right.

The Court: Is that all?

Mr. Howell: Just a moment, your Honor. I don't want to leave out anything here. I don't want to bother Dr. Leigh any more than I have to.

By Mr. Howell:

Q. On July 5th you put there (indicating paper) that Mr. Davis looked good. What do you mean by looking good?

A. His foot looked good.

Q. His foot looked good?

A. Yes.

Q. It wasn't swollen?

A. Well, it was strapped up.

Q. You couldn't see it through the strap, could you?

A. Well, it wouldn't be swollen if there was strapping.

Q. Was it swollen when you strapped it the night that it had been broken?

A. No.

Q. It was not?

A. No. He had been using it. He had had on a shoe; had practically no swelling, if any at all. It was sore and [fol. 168] tender but it was——

Q. You said his foot looked good. Did he tell you it pained him so he wanted to use crutches?

A. Told me that it pained so that he used crutches.

Q. He wanted to use crutches?

A. No, he was using them. He came in on them.

Q. Don't your notes say there "He wants to use crutches"?

A. No. He insists on using crutches. He came in on crutches and I explained to him, I said, explained that he does not need crutches, obviously needs a well-fitting shoe and strapping and to return the next day. At the same time that Mr. Davis came into my office, one of our very prominent doctors here in Norfolk had almost exactly the same thing, a fracture of the base of the metatarsal bone.

Q. Entering the joint?

A. Into the joint.

Q. Into the joint?

A. Into the joint.

Q. Who was that?

A. Dr. Walter Paul Adams.

Q. Dr. Walter Adams?

A. And he——

Q. Were you treating him?

A. He kept some strapping——

Q. Let me ask you, were you treating him?

[fol. 169] I saw Dr. Adams, told him to do exactly the same thing. He continued with his calls, running up and down the steps and he hadn't—kept right on with his work.

Q. You know that of your own knowledge, of course?

A. Sure.

Q. You saw him running up and down, on those calls?

A. That is right; even ran up and down the steps out there at the hospital, and at the office.

Q. You watched?

A. And he did much better.

Q. You watched him run up and down the stairs?

A. I saw him go up the steps right in the same office where I was.

Q. You don't mean to tell us you watched when he ran up and down the steps on his calls, do you, Doctor?

A. No.

Q. I didn't think so. After you have a fracture that enters the joint, is there any way to tell when it has healed other than by taking another X-ray?

A. Well, the X-ray won't show anything for about six weeks on these.

Q. You mean it is still going to be fractured at least six weeks?

A. Well, it will take that long for the bone to grow across.

[fol. 170] Q. How are you going to ever know when it has healed without taking another picture?

A. By the symptoms. But we usually take another picture on him, yes.

Q. That is the usual and normal custom, isn't it?

A. Sure.

Q. But in the case of Clifford Davis you never took another picture?

A. He didn't come back.

Q. He came back in August, didn't he?

A. But he had been to Dr. Thiemeyer in the meantime.

Q. You still didn't take a picture?

A. No.

Q. You reported to the Virginian the fact that he had been to Dr. Thiemeyer?

A. (The witness nodded) And he had taken a picture.

Q. You didn't look at Dr. Thiemeyer's picture, did you?

A. No.

Q. But you reported to your employer, the Virginian, that he had been to Dr. Thiemeyer?

A. Yes.

Q. And you did that in the regular scope of your business with the Virginian?

A. You mean reported that he had been to Dr. Thiemeyer?

[fol. 171] Q. Yes. Didn't you do that in the scope of your regular——

A. No. No, I made no report to them about it.

Q. You did or did not?

A. Did not.

Q. You didn't call and tell them that he had been to Dr. Thiemeyer?

A. No.

Q. What?

A. No. I didn't make any report to the railroad that he had been——

Q. Orally, didn't you call Mr. Davis and tell him about that on the telephone?

A. Mr. Davis?

Q. I mean Mr. Goodwin.

A. That he had been to Dr. Thiemeyer?

Q. Yes.

A. I don't think so.

Q. You don't think so?

A. No.

Q. You didn't make any report to the railroad with respect to that last entry in August?

A. The last time?

Q. Yes, sir.

A. No. I just told them that as far as I could see
[fol. 172] that he could work with that foot.
Q. You told the Virginian that?
A. Yes.
Q. So you did make a report to them concerning the condition of this man?
A. What his foot was like.
Q. In August of 1957?
A. That is right.
Q. And you did it so that they would know whether or not it was safe for him to work for them?
A. That is right.

Mr. Howell: That is all.

Cross-examination.

By Mr. McNamara:

Q. Dr. Leigh, how much do you receive from the Virginian each month?
A. $125.
Q. Do you get that precise amount?
A. Every month. Do I get all of it?
Q. Yes.
A. No. I think they take out four dollars, something for insurance.
Q. Do they take out railroad retirement payments?
A. No.
Q. Do they take out witholding tax?
[fol. 173] A. No.

Mr. Howell: Ask these questions one at a time.
Mr. McNamara: He has answered them each one.
The Court: Proceed.
Mr. Howell: He got insurance.

By Mr. McNamara:

Q. Do they take out social security?
A. No.

Mr. Howell: If your honor please, no railroad man is subject to social security. Mr. McNamara knows that they come under an entirely different act and everybody——

By the Court:

Q. Well now, do they take out anything other than the withholding tax?

A. No, sir.

Mr. McNamara: They don't take out withholding tax.

By the Court:

Q. What is the four dollars for?

A. Insurance.

Q. They don't take out anything except insurance?

A. No.

By Mr. McNamara:

Q. All right. Has the Virginian Railroad ever furnished you any equipment that you use as a physician?

A. No, sir.

[fol. 174] Q. Do they furnish you your office or your premises or have any control thereof?

A. No, sir. I wish they would.

Q. Do they furnish or have any control over the other employees in your office?

A. No.

Q. Do they furnish you any means of transportation, automobile? You may get a pass on the railroad, I don't know.

A. No. I have a pass on the Virginian but they do not have any passenger trains, so there is nothing to ride.

By the Court:

Q. Do you have other practice, other than this?

A. I little bit, I hope.

By Mr. McNamara:

Q. Does the Virginian Railway, anybody employed thereby, exert any control over you in the manner in which you treat your patients?

A. None whatsoever.

Redirect examination.

By Mr. Howell:

Q. Doctor, for $125 a month you can't spend too much time with these employees of the Virginian Railway, can you?

A. I do.

Q. You have quite a bit of work for the Virginian, don't you?

[fol. 175] A. I have a few, yes.

Q. And no matter how many times you see a man or how many men you see, they are not going to pay you more than $125 a month, are they?

A. Well, they pay me for examinations and things of that kind. They pay me for giving flu shots to the employees, things of that kind.

Q. They pay you to give the flu shots to the employees?

A. Yes.

Mr. Williams: The examinations.

The Witness: And the examinations.

By Mr. Howell:

Q. They pay you extra for those?

A. Yes.

Q. When they have an injury case, no matter how many times you see that man or how many men you see that are injured, you are not going to get but $125, is that right, sir?

A. That is right.

Q. So the fewer times you see a man, the more money you are going to make off the Virginian during that particular month?

A. No.

Q. Is that true or not?

A. How would I make any more money by seeing them less?

Q. You wouldn't have to spend that much time on these [fol. 176-178] men who are already paid for, and you can devote it to some other——

The Court: Is that pertinent to the issue?

Mr. Howell: Yes, sir, I think it is.

By Mr. Howell:

Q. Let's get back to the four dollars. What type of insurance is this, Dr. Leigh?

A. The railroad has a group insurance policy that was taken out for their doctors some years ago, the doctors on the railroad, and I think the premium is four dollars and a few cents a month.

Q. Do you have to be in the employment of a railroad in order to be entitled to this group insurance?

A. Just the doctors I think is all that is in it.

Q. You have to be in the employment of the Virginian in order to receive——

Mr. McNamara: I think that is calling for a conclusion. It is misleading to the doctor, in the first place.

The Court: He has been employed, it is not debatable he is being employed by the Virginian?

* * * * * * *

[fols. 179-180] J. M. Goodwin, recalled, testified further as follows:

Examined By Mr. Howell:

* * * * * * *

[fols. 181-182] Q. I hope this is not repetitious but is it not true—let me ask you this: What instructions, if any, are given to the employees of the Virginian Railway with respect to what doctor they shall report to if injured on the job, as of July 3, 1957?

A. They have the privilege of going to the company doctors that we supply up and down the railroad. They are not compelled to go to those doctors; and if they want to go to a doctor of their own choosing, they may do so.

* * * * * * *

[fol. 183] A. Rule 731. (Reading) "Employees injured on duty should, if able, report to the nearest resident surgeon or, if no resident surgeon is available, to the nearest company surgeon."

[fols. 184-185] Q. All right, sir. Now—

A. (Continuing) "or if neither is available, should communicate with the superintendent for instructions. In event of serious injury or emergency, the employee or official in charge shall immediately communicate with the superintendent for instructions, or if that is not possible, will obtain the service of the nearest available surgeon and notify the superintendent."

* * * * * * *

[fols. 186-189] A. This is rule 733: (Reading) "An employee injured on duty who has received medical treatment must obtain a return to duty slip from the surgeon rendering such treatment before returning to duty unless otherwise instructed by his employing officer."

* * * * * * *

[fol. 190] By Mr. Howell:

Q. Had you received complaints concerning the manner in which Dr. Southgate Leigh was treating injured railroad employees, before the case of Clifford Davis?

[fol. 191] A. Well, I don't know just what you mean by complaints. If you mean that some fellow just come in, said, "Well, I didn't like Dr. Leigh's treatment," why, I had received such complaints.

* * * * * * *

[fol. 192-198] The Court: You would have to put on evidence to say that in a particular case the medical expert would say that Dr. Leigh was wrong and a matter of malpractice and the company knew about it and continued his employment. If you have that kind of evidence, put it on.

Mr. Howell: We have done that in this particular case but, your honor doesn't seem to understand what I am attempting to prove.

The Court: I know exactly what you are attempting to prove. No one else has ever been able to prove it in any case.

Mr. Howell: Your honor, in due deference to your honor, this is the first time that the question has ever been presented to this honorable court as to whether or not a railroad doctor is such an employee of the railroad that the

railroad itself, as a principal, is responsible for its agent's acts.

. . . . . .

[fols. 199-200] Q. What, if anything, have the Virginian employees, as a group, individually or through their representatives, stated to your knowledge with respect to the retention or dismissal of Dr. Southgate Leigh as the surgeon of the Virginian Railway at Norfolk?

A. There was some correspondence about it and I don't have that with me and I don't know just when the date of it was or——

. . . . . .

[fol. 201] By Mr. Howell:

Q. You didn't talk to Dr. Southgate Leigh?

A. No, sir.

Q. What?

A. No, sir.

Q. Were you told to talk to him; did you receive instructions with reference to Dr. Leigh from the Assistant to the President of the Virginian Railway?

A. Yes, sir.

Q. What were those instructions?

A. I can't recall. I don't have the letter with me and I wouldn't attempt to repeat it here.

Q. Did you receive an interoffice memo from the Assistant to the President? Did you get a memorandum from him pertaining to the subject of Dr. Leigh?

A. I got a letter, copy of a letter.

[fols. 202-204] Mr. Howell: I call for the production of that letter for the purpose of refreshing the witness's recollection. Could you have one of your many assistants go to the terminal and pick that letter up for us?

Mr. McNamara: If your honor please, we object; a man that we produced——

The Court: The Court has ruled out that line of questioning. He may or may not produce it; the Court can't compel him to produce it, because it is not in this case so far as the ruling of the Court is concerned.

. . . . . .

[fol. 205] Q. How many employees did he treat on the property in 1957, if you know?

A. The only ones I know of—and I don't know how [fols. 206-207] many—we arranged to give the employees flu shots here awhile back and when Dr. Leigh set up his equipment down there in a vacant office room and gave the shots——

Q. Over 200 people were treated in that method on the premises at the direction of the Virginian Railway, by Dr. Leigh?

A. That is right.

* * * * * * *

Q. Now I am talking about: How many employees did he give shots to on the property. In excess of two hundred?

A. I think it was around two, two fifty, something like that.

* * * * * * *

[fols. 208-209] Q. Who told Dr. Southgate Leigh to go to the coal piers to give the shots?

A. We arranged it because it was the most convenient place to give the shots.

Q. For whom? The Virginian or for Dr. Leigh?

A. For the employees.

* * * * * * *

[fols. 210-212] The Court: You are moving out in a field into which no else has gone so far as I know. There have been thousands of cases in this state by railroad employees against the railroad and——

* * * * * * *

[fol. 213] Cross-examination.

By Mr. NcNamara:

Q. Mr. Goodwin, is this the rule book you were reading from at the request of Mr. Howell a moment ago?

A. Yes, it was.

Q. Will you look on page 162 and read Rule 732, please?

* * * * * * *

[fols. 214-216] Q. All right, sir. Read it.

A. Rule 732 reads: (Reading) "Employees injured on duty who select the services of physicians or surgeons other than as provided by the company must assume the expense thereof."

* * * * * * *

[fol. 217] CHARLES J. PENNINGTON, called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined by Mr. Howell:

* * * * * * *

[fol. 218] Q. When did you first go to work for any railroad?

A. '56.

* * * * * * *

Q. On July 3, 1957, had you ever worked as a senior brakeman on the Ford switching plant job?

A. No, sir.

* * * * * * *

[fol. 219] Q. Prior to July 3, 1957, had you ever spotted cars in the house at the Ford plant?

A. No, sir.

* * * * * * *

[fol. 220] Q. Did you know how to spot cars in the house?

A. No, sir.

Q. Did you need any assistance on the morning of July 3, 1957?

A. Yes, sir.

Q. Whom did you ask to assist you?

A. Peanut.

Q. Speak a little louder. We can hardly hear you.

A. Mr. Davis.

* * * * * * *

[fol. 221] Q. Whose duty is it to spot the cars in the house, Mr. Pennington?

A. The senior brakeman.

Q. And you were acting as what?

A. Senior brakeman.

. . . . . .

[fol. 222] Q. Do you know why he was coming back?

A. To—he was coming back there with me to show me where to spot cars.

Q. When did you last see him?

A. I seen him when he come to the "gon."

Q. What do you mean by "gon"? Gondola?

A. Yes, sir. That is the lower car from the boxcar.

Q. What if anything did he have to do when he came to the gondola?

A. He had to come down and run up ahead and catch a car that was higher, so he could walk on back to me.

. . . . . .

Q. Are you familiar with the right of way or the ground adjacent to the track as it existed on July 3, 1957?

A. Yes, sir. It is a grassy slope and about a 45-degree angle going down towards the plant.

Q. What is the purpose of the ground immediately adjacent to the track with reference to its use by brakemen?

A. To get on and off cars.

. . . . . .

[fol. 223] Cross-examination.

By Mr. McNamara:

Q. When you talked to Mr. Davis after he had been hurt, he told you he had fallen off the car, didn't he?

A. Yes, sir.

. . . . . .

[fol. 224] Q. Were you asked to do anything out there that day or directed to do anything out there that day, prior to the time that this accident happened, that you were unable to do?

A. Yes, sir. I—I made quite a few mistakes.

. . . . . .

[fol. 225] Q. You did not see Davis fall?

A. That is right.

Q. You don't know what caused him to fall?

A. (The witness shook his head)

* * * * * * *

[fol. 226] T. R. PAYNE, called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

[fol. 227] Examined By Mr. Howell:

Q. Mr. Payne, state your full name, sir.

A. Titus R. Payne.

Q. And how long have you been working for the Virginian Railway?

A. About three years on Sewells Point yard.

Q. Had you worked for any railroad before you went to work for the Virginian?

A. I worked for the Virginian on the west end, on another division.

* * * * * * *

Q. Are you familiar with the switching operation at the Ford plant?

A. Yes, sir.

Q. How many years' experience have you had in that operation?

A. I have only had about two months at the Ford plant.

Q. How long have you been a brakeman, altogether?

A. About six years.

Q. To your knowledge, when does the morning switch have to be performed at the Ford plant?

A. It has to be set up by 11:30.

Q. What time do you start?

[fols. 228-229] A. 11:00 o'clock.

Q. How much time, from your experience as a brakeman, some eleven years, is required to safely effect switching operations at the Ford plant?

A. That would all depend on the switch order.

Q. All right, sir.

Mr. Howell: Where are the exhibits, Judge?

The Court: Right over there.

By Mr. Howell:

Q. (Picking up an exhibit) Take time to examine the switch order. (Handing to witness)

A. (Witness examining)

Q. Have you had a chance to look at those orders there?

A. Yes, sir.

Q. All right. Can you answer the question now with respect to that particular lineup?

A. With two experienced brakeman it would take 45 or 50 minutes.

[fol. 230] By the Court:

Q. Suppose you took longer than you were supposed to; is there any penalty? Would it cost you any salary or anything penalized?

A. No, but the yard office is informed that we are late making our setup and they, in turn, want to know why, if we are doing our job correct.

Q. If it took you longer than you thought it would take, you would get paid for the overtime, for the additional time, wouldn't you?

A. Yes, sir, would get paid.

Q. You wouldn't lose your job, would you?

A. No, sir.

* * * * * * *

[fol. 231] By Mr. Howell:

Q. Suppose you do not have experienced brakemen, how long do you estimate it would take to safely do the job?

A. An hour and ten minutes, an hour and fifteen minutes. That is just an estimate.

Q. And if you don't do that job within the 30 minutes, you have to make out a time return and delay report, do you not?

A. Yes, sir.

Q. Can you identify that form?

A. Yes, sir. That is a delay report.

Q. And what is done with that report?

A. We turn it in at the yard office after our tour of duty.

Q. To your superior officer or who?
A. To our superiors, yes, sir.

* * * * * * *

Q. Mr. Payne, are you familiar with the condition of the right of way for the several hundred yards before you get [fol. 232] to the house at the Ford plant, as it existed July 1957?
A. Yes, sir.
Q. What was the condition?
A. It was rough, bad for switching. Some of it was in good shape, about 75 yards.

* * * * * * *

Q. What is the purpose of this ground immediately adjacent to the track with reference to its use by brakemen?
A. He has to use it to get on and off cars.
Q. What is the usual condition of the ground immediately adjacent to the track in the switching yard?
A. It should be smooth, level.

* * * * * * *

[fol. 233] Cross-examination.

* * * * * * *

By Mr. McNamara:

Q. I withdraw it and ask you this: You are a brakeman. You have never operated that job as a conductor, have you?
A. Yes, I have.
Q. You have?
A. Yes.
Q. As a conductor. Now, your brakemen working under you will work just as fast or just as slow as you order [fol. 234] them to, will they not?
A. Yes.
Q. Whether an operation is completed within a certain time or whether it is not depends on how fast the conductor orders his men to work and works himself, doesn't it?
A. It is that and the switch order, yes.

* * * * * * *

[fols. 235-239] ROBERT L. JAMES, called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

* * * * * * *

[fol. 240] Direct examination.

By Mr. Howell:

Q. How about the area from two hundred yards out from the house, from the house two hundred yards back?
A. It was in bad condition for working.

* * * * * * *

[fols. 241-242] Cross-examination.

By Mr. McNamara:

Q. What is your answer to that? Did you ever finish that operation on the days that you were working out there? Did you ever finish it during the time that the Ford people were at lunch?

Mr. Howell: We note our exception.
A. Sometime we did, yes, sir.

By Mr. McNamara:

Q. Sometimes you did, sometimes you didn't?
A. Yes, sir.

* * * * * * *

[fol. 243] Redirect examination.

By Mr. Howell:

Q. How is the Ford switching operation classed by the Virginian Railway?
A. It is classed as a hot job.

* * * * * * *

Q. What do you mean by hot job, Mr.——
A. Well, when I say it is a hot job I mean the men, everybody—I worked it for the last three summers. I have

been with the railroad for two and a half years, but the first [fols. 244-245] year I was there with them I started working at the Ford plant, and you do your job a little faster there than you would in the yard. But nevertheless you do it under—safely as possible always. Always, ever since I have been with the railroad, the conductor has always told the brakeman to conduct his job as safely as you possibly can. But on the jobs at the Ford plant, we always try to do a little better job out there than we did in the yard, a little bit hastier on it.

Q. Is that why you call it a hot job?
A. Yes, sir.

* * * * * * *

Recross-examination.

By Mr. McNamara:

* * * * * * *

[fol. 246] Q. That is what I thought. The same question I asked you in the first place. What is the difference in the switching operation at the Ford plant from any switching operation in any yard?

A. The difference of the Ford operation, that we know that they—we know what time they want their work to be done out there. We know what time it is required for it to be done. And I would say that it would be a time limit, We try to make it out on a time limit schedule out there. Or anywheres in the yard there is no time limit that we have to do anything on.

* * * * * * *

Q. The way you do it, what you do.

A. I told you the job was a little hot. We try to make a little more effort, do a little faster than we would otherwise.

[fol. 247] Q. I don't know whether you are refusing to answer this question or not. It is perfectly simple. Is it not correct that so far as what you do in coupling cars up, coupling them, moving them here and throwing switches, there is no difference in your operation at the Ford plant from any other place, is there?

A. As far as throwing switches, switching cars, pulling pins, there is no difference, no.

* * * * * * *

GEORGE T. LINKENHOKER, called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined by Mr. Howell:

Q. You are Mr. George T. Linkenhoker?

A. Yes, sir.

Q. Mr. Linkenhoker, how many years, altogether, have [fol. 248] you been working for a railroad?

A. Approximately twenty.

Q. How many years' experience have you had as a brakeman or yard conductor?

A. As a brakeman, approximately twenty; as a yard conductor, three, I think.

Q. Are you familiar with the switching operation conducted by the Virginian Railway at the Ford plant in Norfolk, Virginia?

A. I was assigned there, yes, sir.

Q. Did you have occasion to go to the Ford plant in July of 1957?

A. Yes, sir.

Q. Are you familiar with the condition of the ground immediately adjacent to the tracks from a point starting at the house and coming out 150 to 200 yards?

A. Yes, sir.

Q. What was the condition of the ground in July 1957?

A. Beginning at the entrance of the house, the track is on a descending grade. Adjacent to the track or as we call it, the berm, there is practically no berm.

Q. How do you spell that word berm?

A. Berm (spelling it) I think—I believe. The ground was rough and I am inclined to think you would almost call it a drainage at this particular—just beyond the entrance to [fol. 249] the house.

Q. Did you observe a slope in that area?

A. Yes, sir.

Q. What is you opinion as to the suitability of that ground considering its topography, its character, its nature, for use, as a brakeman?

Mr. McNamara: If it please the Court, I object to that. I am sure it is objectionable on several grounds. For one thing, it calls for the man's opinion; calls for the use of the

ground, which is not involved in this case; calls for the use of the ground by brakemen, which is not involved in the case.

The Court: You may ask him what the condition was at the time.

Mr. Howell: We have asked.

By Mr. Howell:

Q. What was the condition? Have you already testified to that?

A. In July of 1957?

Q. Yes, sir.

A. I believe I said that it was rough; tantamount to a drainage situation.

The Court: That is as far as he can go; he tells what it was.

Mr. Howell: I didn't hear you.

[fols. 250-251] The Court: He can say what it was and he has done that.

Mr. Howell: I except to your honor's ruling. I feel he is qualified as a lay expert. One doesn't have to be an engineer.

The Court: He may testify as to the ground by the rails or on other parts of the railroad.

By Mr. Howell:

Q. What is the usual and customary condition of the ground and switching areas?

A. Well, it is generally level.

* * * * * * *

Q. Mr. Linkhoker, how many men should be provided a yard conductor to conduct a switching operation at the Ford plant that would involve a movement as reflected by this switch and pull order? I would like for you to examine that.

* * * * * * *

[fol. 252] Mr. Howell: No, sir. My question is, is your Honor going to permit him to answer my question?

The Court: No, not his opinion.

Mr. Howell: Note my exception. You understand that we are trying to establish what is reasonable care, and your honor feels that we cannot put on testimony?

• • • • • • •

[fol. 253] Q. Mr. Linkenhoker, how much time would be required to safely execute a switching operation as reflected by Plaintiff's Exhibits 2 and 2-A, based upon your twenty some years' experience as a brakeman and some three years' experience as a yard conductor?

Mr. McNamara: I object.

The Court: Objection sustained. You haven't made a complete statement. If they had a hundred men, they [fol. 254] could do it in less time than three men. You might add to your——

By Mr. Howell:

Q. With two experienced brakemen, if you had two experienced brakemen, just two and one conductor, how long would it take to safely carry out a switching operation of the character reflected by Plaintiff's Exhibits 2 and 2-A?

Mr. McNamara: I object to that, your honor.

The Court: I overrule your objection. He testified that he had worked on that operation. Go ahead.

Mr. McNamara: Note an exception.

Mr. Howell: Keep your voice up, Mr. Linkenhoker, so we can all hear you.

A. I think we could set the house up in fifty minutes.

Mr. Howell:

Q. How long would it take, in your opinion, if your senior brakeman had never before had any experience in spotting the house at the Ford plant?

The Court: You mean never before? Wasn't there testimony that he had worked five days?

Mr. Howell: Had never before spotted the house at the Ford plant job. That is the job he was assigned to. Not being in the caboose or tending the fires or riding

the rear of the train, but spotting the house at the Ford plant.

[fols. 255-258] The Court: Go ahead, sir.

A. An hour.

Mr. Howell: That is all. Answer the questions that Mr. McNamara may have.

Cross-examination.

By Mr. McNamara:

Q. Sir, you say you have had considerable experience at the Ford plant job?

A. I said so, that I worked the assignment.

Q. You worked the assignment?

A. Yes, sir.

Q. How many times?

A. I was conductor on that assignment in 1956 and I caught it as a brakeman at various other times. I am not in position to tell you the exact dates.

Q. For how long were you there during 1957?

A. Very probably around three weeks, maybe four.

Q. You were conductor. How many brakemen did you have under you?

A. Two.

* * * * * * *

[fols. 259-261] Craig B. Fulp, called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined By Mr. Howell:

Q. Mr. Fulp, state your full name, sir.

A. Craig Benbow Fulp.

Q. In 1957, what was your age, as of July 1957?

A. 18.

Q. How long had you been working for the railroad in 1957?

A. About a year, I would say.

Q. Had you ever had any experience spotting the house at the Ford plant as a brakeman in July of 1957?

A. No, sir.

Q. What was your job on July 3, 1957?

A. Work as—on the capacity as the junior brakeman or the head end brakeman.

Q. You were the junior brakeman?

A. Yes, sir.

Q. Did you have enough experience to spot the house on July 3, 1957?

A. No, sir.

* * * * * * *

[fol: 262] Cross-examination.

By Mr. McNamara:

Q. Mr. Fulp, you said that when you were assigned to this job you were able to couple and uncouple cars and throw switches and pick up and let off freight cars, which is the job of a brakeman. You did feel capable of doing that at that time, didn't you?

A. Well, I (witness pausing)—well, I will put it this way: I feel that the trainmaster felt that I was capable of doing that or he wouldn't have sent me out there.

Q. That day that you were out there and prior to the time that Davis got hurt, you had to perform some of those maneuvers, didn't you?

A. Yes, sir.

Q. Tell us some of the things that you did.

A. Well, like he told me to, you know. Before he went into the house, well, we put some cars down on the house track and I was supposed to go back and—one, two or three, [fol. 263] I don't remember which one, pick up five or six more cars and come back up and shove back into the house track. And I couple up.

Q. In doing just what you said, going from the house track to one of the storage tracks and picking up other cars, who would give the signals to the engineer?

A. Well, I would.

Q. You would?

A. (The witness nodded)

Q. And who would throw the switches?

A. Well, I would.

Q. You would. Who would handle the coupling and see that the cars were properly coupled to the engine?

A. I would.

Q. You did all those things that day on this job before Davis was hurt, didn't you?

A. Yes, sir.

* * * * * * *

[fol. 264] By Mr. McNamara:

Q. All right. You say you put certain cars into the house track and then you directed the engine back to one of the storage tracks?

A. Yes, sir.

Q. Those cars that were in on the house track were standing in there before you came back in to push them into the house, were they not?

A. Yes, sir, as far as I remember.

Q. They were standing still before you coupled up to them, were they not?

A. Yes, sir.

Q. About how long had they been in there standing still?

A. Well, I——

Q. Before you coupled up to them.

A. Well, I would say not over five minutes, at the least.

Q. About five minutes?

A. No, I wouldn't say five because it doesn't take too long to go from one other place, pick up five cars and then come back. I would say about five or a little less than five.

Q. All right. You didn't see Davis fall, did you?

[fols. 265-273] A. Not—no.

Q. After he was hurt, did you talk to him?

A. Yes, sir, I did.

Q. Did he tell you how he felt or how he was hurt?

A. He told me he slipped off the top of a car.

* * * * * * *

[fol. 274] GEORGE T. LINKENHOKER, recalled, testified further as follows:

Examined by Mr. Howell:

* * * * * * *

Q. Based upon your 20 some years' experience as a brakeman, how many brakemen should be assigned to a conductor in order to safely effect this switching operation at the Ford plant?

A. I think a minimum of three.

* * * * * * *

[fol. 275] Cross-examination.

By the Court:

Q. He wants to know, on the occasion of this conductor being hurt coming down a ladder, if they had had fifty brakemen there, would not the conductor have suffered the [fol. 276-278] same injury? The number of people there on the job, would that help him not to fall?

A. If he had sufficient men there, your honor, he wouldn't have to have boarded that car to begin with. He would have been on the ground, in my opinion. He wouldn't have had to get on the——

Q. You have acted as conductor?

A. Yes, sir.

Q. Do you ever get on top of those cars?

Mr. Howell: Under what circumstances?

The Court: Under those circumstances at the Ford plant.

A. When it is necessary for me to direct the movement ahead and behind of me, yes, sir.

* * * * * * *

[fols. 279-286] GEORGE MILTON CORNELL, called by the plaintiff as an adverse witness, and having been first duly sworn, testified as follows:

. . . . . .

[fols. 287-291] By Mr. Howell:

Q. Did you direct Mr. Goodwin to talk to Dr. Southgate Leight regarding his relationship with employees of the Virginian Railway?

Mr. Williams: We object to that question.
The Court: Objection sustained.
Mr. Howell. We note our exception. That is all.

. . . . . .

[fols. 292-293] MOTION TO STRIKE OUT THE PLAINTIFF'S EVIDENCE SUSTAINED

The Court: Ladies and gentlemen, the Court has sustained the motion of the defendant to strike out the plaintiff's evidence. You are therefore discharged from further consideration of this case.

[fol. 294] Judge's and Clerk's Certificates to foregoing transcript omitted in printing

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[fol. 295] IN THE SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

ORDER DENYING PETITIONER'S APPEAL—OCTOBER 10, 1958.

The petition of Clifford M. Davis for a writ of error to a judgment rendered by the Circuit Court of the City of Norfolk on the 17th day of February, 1958, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Virginian Railway Company, a corporation, was defendant, having been maturely considered and a transcript of the record of the judgment

aforesaid seen and inspected, the Court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said Circuit Court.

[fol. 296] SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1958

No. 512 Misc.

CLIFFORD M. DAVIS, PETITIONER,

vs.

VIRGINIAN RAILWAY COMPANY

On petition for writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—April 20, 1959

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transfered to the appellate docket as No. 855 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 53

CLIFFORD M. DAVIS,

Petitioner,

v.

VIRGINIAN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE PETITIONER

HENRY E. HOWELL, JR.
R. ARTHUR JETT
702 Royster Building
Norfolk 10, Va.,

Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 53

CLIFFORD M. DAVIS,

Petitioner,

v.

VIRGINIAN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE PETITIONER

Opinions Below

The Circuit Court of the City of Norfolk's opinion and order holding that the petitioner's evidence be stricken and summary judgment entered for the respondent was an oral opinion and is not officially reported (R. 65). The decree of the Supreme Court of Appeals of Virginia affirming the judgment of the Lower Court is not reported and was given without an opinion (R. 65).

Jurisdiction

The decree of the Supreme Court of Appeals of Virginia was entered on October 10, 1958. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

Questions Presented

1. The Virginian Railway Company, respondent, ordered the Petitioner, Clifford M. Davis, to perform an assigned task within a limited period of time which did not permit this task to be performed at a safe working speed. This condition was aggravated by the respondent furnishing the Petitioner with inexperienced and an insufficient number of fellow employees. The Petitioner, as a result of these conditions, was unable to take proper safety precautions and slipped and fell from the top of a boxcar. Petitioner was injured when he landed on the improperly constructed and maintained right of way adjacent to the boxcar. The first question presented is whether, under these circumstances, the issue of the respondent's negligence should have been submitted to a jury.

2. The Virginian Railway Company, respondent, selected and paid salaries to physicians to treat the railroad employees of the respondent. These physicians, in addition to being paid a salary, were covered by the respondent's group insurance policy and prepared and forwarded medical reports to the respondent's claim agent and various supervisors, but not to the injured employee. These physicians would not give such a report to another party if treating a private patient. Petitioner and other employees were instructed to report to these company physicians when injured while working for the railroad. The Petitioner, following his injury, reported to one of these company physicians, where he was examined and treated. This physician ordered Petitioner to return to work before his injury was properly healed and as a result Pefitioner's injury was aggravated. The second question presented is whether, under these circumstances, the issue of the respondent's responsibility for and the negligence of this physician should have been submitted to a jury.

Statutes Involved

Title 45, Chapter 2, Sections 51, 53, 54 and 57 of United States Code Annotated, regulating railroads, in effect at the time of Petitioner's injury, are as follows (effective August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404):

> Sec. 51. Liability of Common Carriers By Railroad, In Interstate Or Foreign Commerce, For Injuries To Employees From Negligence; Definition of Employees.
>
> "Every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in

such commerce and shall be considered as entitled to the benefits of this chapter."

Sec. 53. Contributory Negligence; diminution of damages.

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Sec. 54. Assumption Of Risks Of Employment.

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Sec. 57. Who Included In Term "Common Carrier."

"The term 'Common Carrier' as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

Statement of the Case

Clifford M. Davis, Petitioner, was employed by Virginian Railway Company, Respondent, as a yard conductor and on July 3, 1957, the date of his injury, the Petitioner was assigned the task of "shifting" or "spotting" various rail cars in and about the Ford Plant in Norfolk, Virginia. There were two (2) inexperienced brakemen assigned to the Petitioner to assist him in carrying out his duties.

The Ford Plant in Norfolk, Virginia, owns a spur track which connects the Ford Plant with a shifting yard and various rail outlets. One end of this spur track enters the Ford Plant and runs parallel to a loading platform. Assigned rail cars are "spotted" along this loading platform in accordance with shipping orders. The right of way along the spur track in the area where Petitioner was injured had a forty-five (45°) degree grade sloping towards the track (R. 15). Where shifting operations are carried out, it is necessary for the conductors and brakemen to mount and dismount from the rail cars while these rail cars are standing still or in motion. A safe place to work would require that this right of way be smooth and level (R. 55).

Petitioner was instructed by his superiors to perform his task during the thirty (30) minute lunch period of the Ford Plant employees (R. 10). This task involved remov-

ing all of the rail cars from the Ford Plant and "spotting" new cars from the shifting yard along the loading platform during this thirty (30) minute period. A total of forty-three (43) rail cars had to be shifted during this time. In order to carry out this task, it was necessary for Petitioner to work faster than is normally required of trainmen to carry out shifting operations (R. 57). A yard conductor and two (2) experienced brakemen would require a minimum of fifty (50) minutes to perform this job (R. 53), and Petitioner, as yard conductor, would not have been required to place himself on the boxcars, but would have carried out his assigned duties while on the ground. If the yard conductor was furnished with two (2) inexperienced brakemen, it would require a minimum of one (1) hour and ten (10) minutes (R. 54). Yet, Petitioner, was ordered to perform this task in the limited time of thirty (30) minutes. In carrying out his task, Petitioner was required to ascend to the top of one of the rail cars. One of the inexperienced brakemen then called to the Petitioner for assistance. Petitioner, moving rapidly along the top of the car towards the inexperienced brakeman, trying to carry out his assigned task, reached an open gondola which required him to descend the ladder of the boxcar next to this gondola (R. 13). Petitioner was moving so rapidly that he was unable to take proper safeguards for his safety and he slipped from the top of the ladder and fell to the ground, landing on the slope of the right of way (R. 13, 14). The effect of landing on this slanting surface brought stress to bear on Petitioner's feet and caused a fracture (R. 30).

The Petitioner, immediately following his injury, was taken to a doctor employed by Virginian Railway Company. This doctor was recommended for employment by the respondent's Chief Claim Agent (R. 9), is paid by the respondent (R. 36), is covered by respondent's group in-

surance policy (R. 47), consults with the Claim Agent regarding the settlement of claims (R. 37, 38), and furnishes medical reports to the respondent's Claim Agent instead of to the injured employee (R. 36). The railroad, by its administrative rules, directs all injured employees to report to the company doctor and it was pursuant to this rule that the Petitioner was taken to the company doctor in this case (R. 47). In addition to his duties of treating injured employees, this company doctor also gave mass flu shots to some two hundred fifty (250) employees of the respondent on the premises of the respondent (R. 50).

Respondent's doctor did not put a cast on Petitioner's injured foot and when Petitioner attempted to relieve the pain by the use of crutches, this doctor directed him not to use these crutches. Petitioner was advised that if light work could be found it would aid Petitioner's injury if he would return to work (R. 38). Acting on said doctor's instructions, Petitioner attempted to return to work and aggravated his injury.

Proper treatment of the type of fracture sustained by Petitioner required that this injury be immobilized; that no weight be placed on the foot until the fracture had properly healed. Activity would aggravate the injury and retard the healing period. If any walking activity be required by the Petitioner, crutches should be used. A cast should be placed on the foot to immobilize the same (R. 29).

Summary of the Argument

(A) The abrogation of Petitioner's right to a jury trial under the principles of the Federal Employers Liability Act by the Virginia State Courts contravened the mandate of Congress that uniform interpretation of the rights of

railroad employees be afforded, regardless of the forum. This decision must be reversed for the guidance of the State Courts involved and to eliminate a conflict with the law as laid down in other circuits and by this Court. *Rogers* v. *Missouri P. R. Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957); *Webb* v. *Illinois Central Railroad Co.*, 352 U.S. 517, 77 S.Ct. 451 (1957).

The Lower Courts took from the Petitioner his right to a trial by jury where the facts were: (1) Petitioner, a yard conductor, was required to do the work of a brakeman because the railroad furnished him with inexperienced brakemen. (2) Petitioner was required to effect a shift in thirty (30) minutes which would normally require one (1) hour and ten (10) minutes to safely perform with inexperienced help. (3) The right of way to which Petitioner dropped as he slipped while rushing to assist his inexperienced brakeman in an effort to meet the railroad's thirty (30) minute schedule, was on a forty-five (45°) degree angle and should have been flat. The added stress of landing on the slope contributed to the fracture of Petitioner's foot.

(B) A doctor employed by the railroad to examine an injured employee's fitness to resume work; who consults with and reports petitioner's injury to the railroad Claim Agent; without affording Petitioner similar reports; and who is paid by railroad for such services, and in addition receives the benefits of railroad's group insurance, is an employee or agent for whose negligence railroad is responsible.

The Lower Court rulings inferred that all doctors are independent contractors and as such immunize the employer from liability for their negligence. However, this Court has held otherwise. In *Dezon* v. *American President*

Lines, 318 U.S. 660, 63 S.Ct. 814 (1943), this Court ruled that a shipowner could be responsible for the negligence of the ship's doctor. And in *Sinkler* v. *Missouri P. R. Co.*, 356 U.S. 326, 78 S.Ct. 758 (1958), this Court ruled that a broad and liberal definition should be applied to the words "employee" and "agent" as incorporated in the statute.

ARGUMENT

The Decision Below Permitting Common Law Rules of Negligence to Throttle the Rights Created by the Federal Employers Liability Act Is Inconsistent With the Decisions of This Court and Other Circuits. This Abrogation of Petitioner's Rights Should Be Rejected by This Court.

Petitioner's contention regarding the liability of respondent is founded on the premise that where Petitioner was required to perform a naturally hazardous activity with inexperienced assistance within too short a period of time, there was created an "unsafe place to work." In actuality, the respondent created "an unsafe place of work" when it required the Petitioner to carry out his task in one-half (1/2) the required time. Haste makes waste! Here, the standard of haste set by the respondent unnecessarily increased Petitioner's exposure to injury.

The Lower Court refused to recognize the guides set forth by this Court in determining whether Petitioner's case should be submitted to the jury. The Lower Court infused the common law requirement that there be a showing of a negligent or unsafe condition as the primary cause of Petitioner's injury. The only fact considered by the Lower Court was the narrow point of time when Petitioner lost his balance and fell to the ground. It completely

divorced itself from consideration of the rapid pace at which Petitioner was required to perform his task; the fact that Petitioner, as a yard conductor, would not have been required to place himself on top of the boxcars had he been supplied with experienced brakemen, and thus, would not have been in a position where he could be injured in this manner, and further, that the right of way on which Petitioner landed was improperly constructed and caused the type of injury suffered by the Petitioner. It is submitted that should all causes of action be so narrowly viewed, even by common law standards, there would rarely be a case which could be submitted to a jury.

This Court has time and again emphasized the unique role of the jury under the provisions of the Federal Employees Liability Act. In *Webb* v. *Illinois Central Railroad Company,* 352 U.S. 517, 77 S.Ct. 451 (1957) this Court set forth lines of demarcation for guidance of the Lower Court in determining whether a case should be submitted to the jury.

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the

jury is made out whether or not the evidence allows the jury a choice of other probabilities." (p. 453 S.Ct.; p. 516, U.S.)

See also *Ringhiser* v. *Chesapeake & O. R. Co.*, 354 U.S. 901, 77 S.Ct. 1093 (1957) and *Rogers* v. *Missouri P. R. Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957).

In the instant case there was present an "intimation or atmospheric indication of unwillingness to enforce the governing rules of the Act as laid down by this Court." 352 U.S. 541.

The jury, if allowed to consider the evidence presented by Petitioner, could reasonably have found a verdict for Petitioner without speculation or conjecture, even though such is permitted. *Lavender* v. *Kurn*, 327 U.S. 645, 66 S.Ct. 749 (1946). The Petitioner's assigned task was classified in railroad terminology as a "hot job" (R. 56). This task with two (2) experienced brakemen would be difficult to perform safely and in this instance had to be performed with two (2) inexperienced brakemen (R. 61). To be performed safely, this job would require a minimum of three (3) experienced brakemen (R. 64). Thus, Petitioner was required to perform his task in a hazardous manner (R. 57). A jury could reasonably infer that the unsafe manner in which Petitioner was required to carry out his assigned task could have been the effective cause of Petitioner losing his balance and suffering the injury which followed. *McBride* v. *Toledo Terminal Rail Co.*, 354 U.S. 517, 77 S.Ct. 1398 (1957); *Gibson* v. *Elgin Joliet and Eastern Railway Co.*, 246 F. 2d 834 (C.C.A. 7, 1957). The chain of causation is strengthened when one considers that the Trial Court refused to recognize Petitioner's position that had Petitioner been furnished with two (2) experienced brakemen, Petitioner would not in fact have been in a

position where he could have been injured under these circumstances (R. 36, 51, 52). If Petitioner had been furnished with the proper number of experienced brakemen, he would never have left the ground to move about on top of the boxcars (R. 12, 13). Clearly a jury could have found negligence on the part of respondent on this state of facts. *Butler* v. *New York Central Railway Co.*, 253 F. 2d 281 (C.C.A. 7, 1958). It is pertinent that the Court in this case made the following statement at page 283:

> "* * * the defendant failed to provide plaintiff and his fellow employees with a sufficient number of jacks to avoid the necessity of plaintiff removing them while the tamping machine was on the tracks over the jacks; that it failed to organize its work and to provide plaintiff with sufficient assistance so as to avoid such necessity; that it rushed plaintiff and his fellow workers in the performance of the work and thereby increased the danger and hazard; * * *"

While Virginia ignores the application of the Federal Employees Liability Act under the above circumstances, the Supreme Court of Indiana in *Pittsburg, C., C. & St. L. R.R. Co.* v. *Edwards*, 129 N.E. 310 (1921) has clearly recognized and followed the trends of this Court when it stated at page 313:

> "* * * It is the duty of the railway not to increase the perils of its servants by the inadequacy of the force employed in any particular work.
>
> In the instant case, the complaint charges that appellant violated that duty when its foreman assigned three men to operate the derrick instead of four, and, as there was some evidence to support this charge, the question thus presented, under all the circumstances shown, was clearly one of fact for the jury."

In ignoring the condition of the roadbed on which Petitioner fell, the Trial Court not only ignores the decisions of this Court, but refuses to recognize the clear and unequivocal language of the Federal Employers Liability Act, Section 51, which provides in part as follows:

> "* * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The evidence established that the roadbed adjacent to the tracks where switching operations were to be performed should be level and smooth, but that this roadbed was rough and had an improper incline of about forty-five (45°) degrees sloping down to the tracks (R. 15, 55). Clearly, respondent violated a duty owed to the Petitioner which should have been submitted to the jury for determination. *Atlantic Coast Line R. R. Co.* v. *Gunter*, 229 F. 2d 842 (C.C.A. 5, 1956). Here the Court noted at page 844:

> "* * * switching operations were going on over it, operations which required the switchmen to alight from moving trains and obligating the company to use reasonable care to furnish a reasonably safe footing for such alighting."

Although the right of way along the spur track was controlled by the Ford Motor Company, the respondent was not excused from its nondelegable duties to furnish Petitioner a safe place to work. *Brock* v. *Gulf Mobile & Ohio R. Co.*, 27 S.W. 2d (S.Ct. Miss. 1954).

The Decision Below Was in Conflict With the Decisions of This Court When Petitioner Was Denied the Right of a Jury Determination of Whether the Respondent Was Responsible for the Acts of the Company Doctor and Whether These Acts Were in Fact Negligent.

The Respondent admittedly did not exercise control over the method of treatment by the doctors it selected. Yet, it selected and controlled all other activities of these doctors in an effort to control and be informed of the nature of injuries suffered by its employees. This would present a tactical advantage, should these injuries become the subject of litigation. On the narrow issue of control of the actual treatment, the Lower Court ruled as a matter of law the respondent would not be responsible for the acts of this doctor (R. 28, 48, 50, 65). This is in conflict with the decisions of this and other Courts. *Dezon* v. *American President Lines*, 318 U.S. 650, 63 S.Ct. 814 (1943); *O'Donnell* v. *Pennsylvania R. Co.*, 122 F.Supp. 899 (S.D.N.Y. 1954).

The doctor selected by respondent had an office, which the doctor personally selected and was not located on the premises controlled by the respondent (R. 8). However, this doctor was selected and recommended for employment by the respondent's Chief Claim Agent (R. 7), is paid a salary by the respondent (R. 36), and is covered by the respondent's group insurance policy (R. 47). The doctor furnishes medical reports for the injured employee to the respondent's Chief Claim Agent (R. 38), but admittedly would not furnish such reports to a third party if the patient was not the respondent's employee (R. 37) and discusses the settlement of these claims with the Claim Agent (R. 37). Respondent's doctor advised as to when Petitioner should resume his duties for respondent. By

its rules, respondent directs that all employees injured while in the course of their employment report to its company doctor (R. 47). It is submitted that on these facts the issue as to whether the respondent was responsible for this doctor's acts should have been submitted to the jury. *Employers' Liability Assur. Corp.* v. *Bell*, 63 F. 2d 935 (C.C.A. 3rd, 1933); *Knox* v. *Ingalls Shipbuilding Corporation*, 158 F. 2d 973 (C.C.A. 5, 1947).

Respondent will emphasize the holding in *Metzger* v. *Western Maryland Ry. Co.*, 30 F. 2d 50 (4 C.C.A. 1929). However, Metzger does not meet the later decision of this Court in *Dezon* v. *American President Lines*, 318 U.S. 660, 63 S.Ct. 814 (1943). At page 668 of 318 U.S., this Court stated:

> "To provide a ship's physician was therefore no mere act of charity. The doctor in treating the seaman was engaged in the shipowner's business, it was the ship's duty that he was discharging in treating the injured eye. While, no doubt, the physician recognized at least an ethical obligation between himself and the patient, he was performing the service because the ship employed him to do so, not because the petitioner did. He was not an independent practitioner, called to treat one whose expenses the ship agreed to make good."

The *Metzger* decision was also rejected in *O'Donnell* v. *Pennsylvania R. Co.*, 122 F.Supp. 899 (S.D.N.Y. 1954).

It is submitted that the doctor here involved was under the circumstances, an employee and not an independent contractor. However, Petitioner points to several other matters in connection with this phase of the case which clearly show that the doctor's status with the railroad was such that it must answer for his negligence.

The very statute here involved provides:

> "Every common carrier by railroad * * * shall be liable * * * for such injury * * * resulting in whole or in part from the negligence of any of the *officers, agents* or employees of such carrier * * *" (Italics supplied.)

It is difficult to imagine a more inclusive statute. Congress has put a stop in all the loopholes the ingenuity of counsel could suggest in this sphere for avoiding liability for the negligence of those who work for the railroad. Thus, assuming, *pro arguendo*, that Dr. Leigh was not an employee of the railroad (which he undoubtedly was) he was at least its agent when he examined the Petitioner and treated him. It does not matter whether under common law the railroad would be responsible for this agent's negligence; being an agent, the railroad is made responsible for his acts of negligence by the mandate of the statute. It thus is of no moment whether the doctor was an independent contractor or an employee. He was an *agent* and the railroad is liable for his negligence. See *Restatement of Agency* §1, p. 10. Thus, here, the railroad is liable not merely for the act of a fellow employee, but for the acts of agents it hires whose conduct is negligence that results in injury to employees. This broadened concept has been given just recognition by the decision of this Court in *Sinkler v. Missouri P. R. Co.*, 356 U.S. 326, 78 S.Ct. 758 (1958).

However, the evidence in this case is such that one need not give an "accommodating scope" to the word "agent" or "employee" to find that the doctor in the instant case was such.

It is further submitted that the testimony introduced on behalf of the Petitioner required a jury's determination

of the issue of the company doctor's negligence. This doctor advised Petitioner to use his foot (R. 38), did not immobilize the injured foot and forbid him to use crutches (R. 38). The Petitioner was advised by this doctor to report back to work. The doctor further testified that despite the fact that there would not be complete healing for at least six (6) weeks (R. 42) that further X-rays were not taken before advising Petitioner to return to work, although this is the usual and normal custom of treating such an injury (R. 42). An orthopaedic specialist testified that it was improper treatment for such an injury to advise the Petitioner on the fifth (5th) day of the injury to use his foot and not to use crutches; that the proper treatment for such an injury would be to immobilize the member until it has healed sufficiently to bear weight without jeopardy of its healing (R. 28, 29). This doctor further testified that Petitioner's injury was aggravated and the healing process retarded by Petitioner's returning to work as advised by respondent's doctor (R. 29).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decisions of the Circuit Court of the City of Norfolk, Virginia, and the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

HENRY E. HOWELL, JR.
R. ARTHUR JETT
702 Royster Building
Norfolk 10, Va.,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 53

CLIFFORD M. DAVIS,
Petitioner,

v.

VIRGINIAN RAILWAY COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE RESPONDENT

W. R. C. COCKE
THOMAS R. MCNAMARA
WILLIAMS, COCKE, WORRELL & KELLY
322 Citizens Bank Building
Norfolk 10, Virginia,
Counsel for Respondent.

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IN THE

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OCTOBER TERM, 1959

No. 53

CLIFFORD M. DAVIS,
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VIRGINIAN RAILWAY COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

Respondent denies that Petitioner's statement of the questions presented on this review (Petitioner's Brief p. 2) is accurate. At the conclusion of Petitioner's evidence, the Circuit Court of the City of Norfolk sustained Respondent's motion to strike said evidence and accordingly entered summary judgment for Respondent in accordance with prescribed procedures in this State. The Supreme Court of Appeals of Virginia denied a petition for writ of error. The questions for review are:

I. Was the evidence of Petitioner sufficient to support, with reason, a jury finding of employer negligence and

causal connection where it established: (a) that he, an experienced brakeman and freight conductor, simply slipped and fell from a perfectly sound ladder on a box car from which he was descending in a normal position where his only suggestion of the cause of his fall was that there might have been grease on his shoe; and (b) that the surface of the right of way was not such as would prevent an injury to persons falling from cars?

II. (a) Under the evidence in this action is Respondent, by reason of the Act, liable for alleged negligence of a physician in his medical treatment of an employee where the physician is a private practitioner, not engaged in any operational activities of the railroad and by all other standards the classical example of a true independent contractor?

(b) Where the evidence simply disclosed a difference in personal opinion between two doctors as to the better manner of treatment of a particular injury, was a jury issue in this action thereby made out on a claim of alleged malpractice?

STATEMENT OF THE CASE

Evidence of Cause of Petitioner's Injury:

Petitioner is a freight conductor for respondent company. Only July 3, 1957, while in charge of a switching operation, he attempted to descend from the top of a box car and slipped from one of the top rungs on the ladder and fell about fifteen feet to the ground and injured his foot. (R. 14, 18). It was a clear summer day at about 11:00 A. M. o'clock. There was no engine coupled to these cars at the time and they were barely moving if at all. Petitioner testified that the car was moving so slowly when he fell from the ladder that it was stopped when he landed on the ground. (R. 26-27).

There was no evidence as to what caused Petitioner to fall. Petitioner's Bill of Particulars states that:

(R. 3)

> "plaintiff is unable to state whether or not the rungs of the freight car from which his foot slipped contained grease or were bent so as to contribute to the plaintiff's fall."

His testimony was as follows:

(R. 13-14)

> "Q. What happened to you as you went down this car?
>
> A. Well, I slipped, my feet slid out from under me and I —
>
> Q. Where were you when that happened? Were you on the ladder or where?
>
> A. I was starting down the ladder.
>
> Q. What rung were your feet on, would you estimate? How far down the ladder had you gotten?
>
> A. I would say the second or third rung."
>
> • • • •
>
> By the Court:

(R. 18)

> "Q. Before counsel for the defendant cross examines, the Court would like to know something about this. You came down a metal ladder, iron ladder or wooden ladder?
>
> A. Metal ladder.
>
> Q. You say you put your feet on the second round from the top?
>
> A. Yes.
>
> Q. How far was that from the ground?
>
> A. That was fifteen, ten or fifteen feet.

Q. When you put your feet on the second round what did you do with your hands, if anything?

A. I had my hands on the top round.

Q. When your feet slipped off, according to your testimony, the second round —

A. A-hum.

Q. — did you turn loose from the hold you had on the ladder with your hands?

A. Pulled loose.

Q. What caused you to fall off that ladder?

A. It is — it might have been grease or anything on my shoe.

Q. It might have been; you don't know what caused it?

A. It is what — something caused slip out from my foot."

Evidence Descriptive of Operation Being Conducted:

The box car from which Petitioner fell was one of fourteen that under his direction had been placed on a siding which led into the interior of the plant of the Ford Company in Norfolk and was called the "house track". The cars were thus between the main tracks and the assembly plant. The operation under way consisted of the removal of a train of empty cars from the interior of the plant and its replacement with a train of loaded cars in pre-designated sequence. The removal of the empties and the assembly of the loaded cars in proper order on the house track preliminary to entering the plant constituted the first phase of the operation and consisted only of normal, ordinary switching and coupling. (R. 57). Petitioner's fall occurred during this phase. The second phase, was the entering of the plant and placing or "spotting" of the loaded cars at particular points within the plant. This phase was not

ready to be commenced at the time of Petitioner's fall, there still being an additional eight loaded cars to be brought onto the house track and coupled. (R. 23).

Evidence Relating to Claim of Time Limit for Job:

Petitioner's statement of the case suggests that he "was moving so rapidly that he was unable to take proper safeguards for his safety", thus causing his fall. Support for this conclusion of counsel is not found in the record. Here Petitioner *walked* along the tops of the cars until he came to the gondola and had to climb down. (R. 13). He then started down the ladder. (R. 14). He put his feet on the second round from the top and his hands on the top round. (R. 18). He was about fifteen feet above the ground (R. 18), and was in a normal, customary position for using the ladder. (R. 19). Then his feet slipped off the rung (R. 13-14) causing his hands to pull loose (R. 18), and he fell. His answer to the direct question as to what caused him to fall off the ladder was that "it might have been grease or anything on my shoe". (R. 18). There was no evidence that Petitioner was moving rapidly or that this contributed to his fall.

The subject of speed is therefore unrelated to Petitioner's injury. Petitioner in his brief, nevertheless, ignoring this hiatus in his evidence, has stated as a fact his conclusion that Petitioner was moving at an unsafe rate of speed and has dealt with evidence pertaining to his reasons for allegedly doing so. His theory is that he was negligently required by Respondent to abandon safety measures for the sake of speed. On the point thus urged by Petitioner, the following evidence is recited although it is admittedly irrelavent to any material issue in this case.

Petitioner as conductor was performing this operation

with the assistance of two brakeman, an engineer and fireman, all of whom were subject to his orders. (R. 23). This was exactly in accordance with past practice. (R. 34, 61). Petitioner was the senior man present and direct the operation. (R. 23). The pace at which the operation was carried out was wholly within his control. (R. 23, 36, 55). Directions attending the operation had in the past been to perform the job during the lunch hour of the Ford employees which lasted thirty minutes. (R. 53). Petitioner also was so instructed on the day he assumed regular work on this job slightly more than a month before his injury. (R. 20-21). However, the time required varied from day to day depending upon the day's switch order. (R. 53). Some switch orders could not physically be carried out during the lunch period, and past experience had been that sometimes the operation was completed within the lunch period and sometimes not. (R. 54, 56). When more time was consumed an explanatory report was filed, and overtime wages were paid. There was no penalty or disciplinary action. (R. 54). It was obvious from a simple examination of Petitioner's switch order for the day of the accident that it could not be completed in that time. (R. 54, 60). It was understood by the conductors in charge that they were never required to do any more than could be done within the bounds of safety. (R. 35). Such were their standing regulations which accompanied and qualified any specific instruction. It was their duty not to abandon any safety precautions for the sake of speed, and this was thoroughly understood by Petitioner as revealed by his testimony as follows: (R. 21-22)

> "Q. He did not tell you that you had to meet that schedule even if it meant for you to abandon safety precautions, did he?
>
> A. No, sir.

• • • •

Q. It is always your job, no matter what you are doing, to observe safety precautions for yourself and for your men, is it not?

A. Yes, sir.

Q. And when you are assigned to do a particular task, that assignment means you do that task while observing your safety precautions, does it not?

A. You have got to work as rapidly as you can and try to be safe while you are doing it.

Q. And try to be safe while you are doing it. And if you reach a point where it is necessary to abandon safety in order to do a certain thing by a certain time, you just have to go slower, don't you?

A. Yes, sir."

Evidence Relating to Claim of Brakemen's Inexperience:

Petitioner's Brief also urges that Respondent was negligent in having on the job a brakeman inexperienced in the second phase of the operation and that such negligence contributed to Petitioner's fall. However, each of the two brakemen had had a year's experience as such (R. 51, 61), and no suggestion is made that any lack of experience on their part in their duties being performed at the time of the accident contributed in any manner to Petitioner's fall. Nor is it suggested that Petitioner was assisting either brakeman in any respect at that time, nor that either brakeman did or failed to do anything which contributed to Petitioner's fall. In the light most favorable to Petitioner the most that can be said of the evidence, and indeed the only contention made (Petitioner's Brief, p. 6), is that it established that he was on top of the box car by reason of the senior brakeman's anticipated need of assist-

ance in the next phase of the operation. Petitioner chose this method of progressing to the point where he could be of assistance when necessary in the future, upon the commencement of the second phase of the operation which was the "spotting" of the loaded cars in the plant. Not until then was he going to assist the brakeman in any manner. (R. 25-26). The remarkable statement to the contrary made in his zeal by Petitioner's counsel (Petitioner's Brief p. 6) that after Petitioner had ascended the cars "one of the inexperienced brakemen then called to the Petitioner for assistance" is completely foreign to the record in this case. Petitioner's movements were pre-arranged between him and the brakeman Pennington (R. 12-13); there was no suggestion that anyone called for assistance; and the time when assistance was going to be needed had not yet arrived. (R. 26).

In addition Petitioner himself was experienced, and there was no evidence that his mere presence on top of the box car exposed him to any unreasonable risk of injury of any kind. He had been a brakeman from 1947 to 1951 and then "off and on" from 1951 to 1955, when he was made a conductor. During all that time, he climbed up and down box cars. His duties as conductor caused him to be on top of such cars at times, and he was thoroughly familiar with the ladders and grab irons. (R. 26).

Evidence Relating to Condition of Right of Way:

Petitioner landed on his feet on a sloping grassy bank along the side of the tracks. (R. 14, 52). The impact caused a fracture in the second metatarsal bone of the foot. While there was testimony that for the use of brakemen in getting on and off cars, the right of way should be smooth and level (R. 55), there was no suggestion of any type of surface which would have prevented injury to persons falling

from cars. On the contrary evidence introduced by Petitioner's medical expert disclosed that if the surface had been flat some fracture would have been probable (R. 30) and that the usual fracture that occurs in a straight fall of that height to a flat surface is one of the os calcis of the heel bone (R. 31, 32) which is a much more serious fracture than the metatarsal. (R. 32).

Evidence Relating to Claim of Liability for Physician's Alleged Negligence:

Subsequent to his injury Petitioner was treated by Dr. Southgate Leigh at Dr. Leigh's office. Dr. Leigh is a surgeon in private practice in the City of Norfolk who owns and maintains his own office and equipment. He is retained by the Respondent company for $125 per month to treat such of the injured employees of the company as may come to him. The employees of the railroad are not compelled to go to Dr. Leigh for treatment, but they have that privilege at no expense to themselves, if they so desire. (R. 7, 47). They select their own physician at their own expense if they wish, as Petitioner's conduct in the case at bar will attest. Company rules provide that "Employees injured on duty who select the services of physicians or surgeons other than as provided by the company must assume the expense thereof." (R. 51). The railroad does not deduct withholding tax or railroad retirement pay, does not furnish or control Dr. Leigh's office, equipment or staff, and exercises no control over him in the manner he treats his patients. (R. 8, 44-45).

Dr. Leigh strapped Petitioner's foot, X-rayed it, recommended that he use it rather than stay off his feet, advised against the use of crutches and did not recommend an arch support or supportive shoe, since he felt it was

better practice not to do so. (R. 38-41). He advised Respondent on about July 20, 1957 that he felt Petitioner could return to light work not involving climbing. (R. 39).

Sometime thereafter Petitioner returned to light work without returning to Dr. Leigh. Dr. Leigh saw him once more on August 22, 1957 which was about two weeks after Petitioner had placed himself in the regular care of his own physician, Dr. Thiemeyer. Petitioner had on August 7, 1957 engaged Dr. Thiemeyer and remained under his care until healed. This physician also had x-rays taken. He testified that in his opinion early ambulation on a fracture retards healing, that it prolongs the injury, that he would have recommended crutches and probably put Petitioner in a cast and subsequently did recommend the use of a steel reinforced shoe. (R. 29). About September 1, 1957. Petitioner returned to regular work.

The differences in personal opinions of these two doctors were not resolved. It was apparent that Dr. Leigh had treated Petitioner in accordance with a medical theory to which Dr. Thiemeyer did not subscribe, but there was no evidence that he was negligent in doing so. There was no medical evidence as to whether either doctor in adopting the theory to which he adhered would thereby have fallen below the standards of practice as established by the average competent physician practicing in like circumstances in this community.

ARGUMENT

At the outset, Respondent respectfully seeks to have it clearly understood that on this review it asks for no departure from the application of the Federal Employers' Liability Act in letter or spirit as that Act has been written by the Congress and construed by this Court. No such

departure has been sought by Respondent nor allowed to transpire by either of the very able courts which have heretofore dealt with the issues now presented to this Court. Aside from the question of Respondent's liability for acts of the physician, separately treated herein, the governing principles of law by which this action has been and must on this presentation be controlled have been clearly defined by this Court. They are:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." *Webb v. Illinois Central Railroad Company*, 352 U. S. 512, 516 (1957).
>
> "Speculation cannot supply the place of proof." *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S. 573, 578 (1951).
>
> The issues may not properly be presented to the jury unless Petitioner has met the requirement "to present probative facts from which the negligence and the causal relation could reasonably be inferred." *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 32, (1949).

The sole burden of this Court, therefore, is to review the facts established by Petitioner's evidence in this case, Respondent having introduced none. They have been set out with particularity in the foregoing Statement of the Case, and will not be repeated at length in this argument.

Established Cause of Petitioner's Injury:

Turning to a consideration of the conclusions which, with reason, may be drawn from such facts, it is notable at this point that the Petitioner's theories of liability do not

question the fact that the primary and moving cause of his injury was his fall from the box car which was caused by the slipping of his feet off the ladder. Petitioner has not suggested that any movement or condition of the box car or any act of Respondent or its employees hampered, disturbed or otherwise physically affected in any manner the freely executed attempted descent of Petitioner from the car. He has not questioned that the physical cause of the fall remains wholly unexplained beyond Petitioner's own suggestion that it might have been caused by grease on his shoe.

Confronted by this status of the evidence, Petitioner has elected to ignore the physical facts which his evidence established and to explore possible theories of liability based on remote and intangible factors which, he argues, combined to create an atmosphere consistent with the occurrence of some injury to someone on the job. He concludes, without more, that Petitioner was required to do his task in an "unsafe manner". The evidence is not sufficient to constitute a jury question under this Act where all the evidence shows that Petitioner fell because of the possibility of grease of his shoe, and if one does not believe this, then there was no evidence as to the cause of Petitioner's fall. *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S. 573 (1951).

Number and Qualifications of Fellow Employees:

Petitioner's theory of liability rests upon bits and pieces of the evidence wholly unrelated to his fall and opinions offered as a hopeful substitute for probative facts. That the number and qualifications of his brakemen had absolutely no direct relation to his fall is not questioned by Petitioner. His argument is solely that these matters caused him to be on the box car from which he subsequently fell.

(Petitioner's Brief p. 11-12). Petitioner thereby would have this Court hold that factors, which on a particular occasion cause a railroad employee to perform a task which is customary to his ordinary duties and which is no more hazardous on that particular occasion than on others, can, with reason, be regarded as causative of an injury suffered from an unexplained fall during the course of such task. The point is contrary to all logic and reason and has been conclusively determined against Petitioner in *Reynolds v. Atlantic Coast Line R. Co.*, 336 U. S. 207, (1949), where this Court upheld a ruling as a matter of law adverse to Petitioner's contention. In so doing it observed:

> "It appears from the complaint that the petitioner's husband was a brakeman whose duties customarily required him to cross between cars on moving freight trains. On one such crossing he fell and was killed. This crossing occurred as part of a required journey from the caboose to a car from which a signal was to be given. The signal ordinarily would have been given from the sixth car from the caboose. The complaint charged, however, that because the railroad had negligently allowed canes to grow alongside the roadbed the deceased could not safely signal from the sixth car and so had to cross to the seventh in order to give the required signal. On this additional crossing he was killed. The complaint also charged that the deceased would not have had to make this particular journey at all if the railroad had provided a competent assistand brakeman. Neither the journey nor the crossing on which the accident occurred was alleged to be any more hazardous than that usually undertaken by railroad brakemen."
>
> 336 U. S. 207, 208 (1949)

Petitioner's evidence in regard to the number and qualifications of the brakemen was not only insufficient to

justify a conclusion of causal connection between these factors and Petitioner's fall, but also presented no facts from which a reasonable inference of negligence could be drawn. No reason has been suggested for Respondent to foresee an unreasonable risk of injury to Petitioner from the creation by it of a situation requiring Petitioner to be on top of box cars, an ordinary and customary position for Petitioner during all his years of work.

Time Limitation:

Petitioner's further theory that an alleged time limitation played a part in Petitioner's injury was precluded by his own testimony as well as that of his witnesses which disclosed that the supposed limit did not touch upon the cause of his fall and indeed that no such time limit existed. Petitioner's own testimony descriptive of his conduct preliminary to and at the moment of his fall revealed that he had walked along the tops of nine box cars and, still walking, came to the end of the box car from which he fell next adjoining an open gondola car. In order to pass the gondola he attempted to descend a ladder on the box car. In starting to climb down he had placed both hands on the top round and both feet on the second round from the top, and was then, according to his own emphatic statement, in a *normal customary position in using that type of ladder.* Then his feet slipped and he fell. There was no evidence that he was hurrying, nor that he was unable to take any safety precautions. Indeed, under his testimony he did take the normal precautions by assuming a perfectly proper hold on the ladder in a perfectly normal position. Notwithstanding such theoretical explanations as his counsel may now have offered in his brief, the only explanation for his fall which Petitioner himself could offer was that he might have had grease on his shoe. If Petitioner did in fact

do any rushing on the job, under his testimony it must have been at other times and places than in the course of performance of the very act in which he was engaged at the moment of his fall. However and whenever this might have been, it did not cause him to get grease on his shoe, if he had any, or to fall in the course of descending a sound ladder in a normal and customary manner. Where a plaintiff in an action under this Act by his own testimony has precluded the theory of recovery upon which he relies, the case in properly withheld from the jury. *Herdman v. Pennsylvania R. Co.*, 352 U. S. 518, (1957).

Petitioner's evidence further disclosed that under no reasonable interpretation of the same could Petitioner's instructions be said to have constituted a time limit requiring him to perform his work in a hazardous manner. He simply was told on his first day on the job to line up the cars for Ford Motor Company while they were at lunch, and he ascertained that the lunch period lasted thirty minutes. He thereafter worked the job regularly for more than a month before his fall. It was undisputed that the time required to complete the work varied from day to day depending up the day's switch order. Sometimes it was completed during the lunch period and sometimes not. When it was not, overtime was involved and the extra wages paid. There was no recrimination. The conductors in charge of the operation had authoritative control over the pace at which the work was done and knew and understood that they were never required by this instruction to do more than they could in safety. Petitioner's switch order for the day of his injury was one which showed on its face could not be done within less than estimates ranging upward from fifty minutes. Petitioner himself knew and admitted in his testimony that such circumstances relieved him of any obligations based on the prior oral instruction

to do the work within the lunch hour. Indeed, he testified that he knew that his duty under such circumstances was to take more time rather than abandon safety precautions.

> "Q. . . . And if you reach a point where it is necessary to abandon safety in order to do a certain thing by a certain time, you just have to go slower, don't you?
>
> A. Yes, sir." (R. 22)

Now on this review Petitioner's counsel seeks recovery on the reverse proposition that Petitioner faced with such circumstances was required to abandon safety for the sake of saving a little time. Petitioner's counsel has found himself once more relying upon a theory which his own evidence has precluded. The controlling principle of the *Herdman* case, stated above, also eliminates this theory of Petitioner from submission to a jury, for his evidence has disproved the existence of the alleged company requirement upon which his argument rests.

Condition of Right of Way:

As to the condition of the right of way in reference to Petitioner's claim that this too contributed to his injury, it is perhaps too obvious to deserve mention that Petitioner's fall was wholly unrelated thereto. Counsel for Petitioner has referred to authorities dealing with a railroad company's duty in respect to its employees walking upon and normally stepping to and from the right of way. These might have some bearing in cases involving those facts, but of course have no pertinency at all to this review. On this point it is sufficient to note that Petitioner's expert medical evidence disclosed that once having fallen from the ladder Petitioner was in all probability destined to suffer a fracture

upon hitting the ground, and that the slope of the ground probably saved him from a more serious injury of the type generally incurred in straight falls to a level surface.

No Liability In This Action for Acts of Physician:

Whether or not an individual was an employee of a railroad within the meaning of the Federal Employers' Liability Act is a question which has been before this Court on numerous occasions in the past, and the governing principles are settled. In *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84 (1915) this Court stated:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee."
>
> 237 U. S. 84, 94 (1915)

While many elements enter into the consideration of the question in any particular case the over-all factor ultimately determinative of each case is the right, not only of judgment over results, but of detailed control over the actions of the individual. *Chicago, R. I. & P. R. Co. v. Bond*, 240 U. S. 449 (1916); *Linstead v. Chesapeake & O. R. Co.*, 276 U. S. 28 (1928); *Hull v. Philadelphia & R. R. Co.*, 252 U. S. 475 (1920); *Robinson v. Baltimore & Ohio R. Co.*, 237 U. S. 84 (1915). Any careful consideration of the facts of a particular case to determine the existence or not of "the conventional relation of employer and employee" necessarily involves a reference or perhaps the leading case on this point, *Standard Oil Co. v. Anderson*, 212 U. S. 215 (1909), from which the following exerpt is taken:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing

> to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed,—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking."
>
> 212 U. S. 215, 221-222, 483-484 (1909)

The test is similar in determining the applicability in any case of the doctrine of respondeat superior where the result depends upon the individual's status as an agent or an independent contractor. The Restatement, Agency, Section 250 *Comment* a., as follows, summarizes the controlling principle:

"*Comment:*

a. A principal employing another to achieve a result but not controlling nor having the right to control the details of his physical movements is not responsible for incidental negligence while such person is conducting the authorized transaction. . . . It is only when to the relationship of principal and agent there is added that right to control physical details as to the manner of performance which is characteristic of the relationship of master and servant, that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor."

The doctrine is also applicable in the instance of the independent contractor's performing some act for the principal in the performance of which the principal owes to another the non-delegable duty of the exercise of due care. Restatement, Agency, Section 251.

In the disposition of cases under this Act these have been the governing principles as well as in other cases. *Baker v. Texas & Pacific R. Co.*, 359 U. S. 227 (1959); *Del Vecchio v. Pennsylvania Railroad Company*, 233 F. (2d) 2 (C. A. 3rd, 1956), cert. denied 352 U. S. 909. The only exception recognized by this Court to the above principles, not applicable here, is pronounced in *Sinkler v. Missouri P. R. Co.*, 356 U. S. 326 (1958), holding that an independent contractor engaged in the furtherance of the actual operational activities of a railroad company, such as yard switching, is an agent of the company within the meaning of the Act.

The traditional test of a jury question on these issues has been re-approved in this Court's most recent decision

on this subject, *Baker v. Texas & Pacific R. Co.*, 359 U. S. 227 (1959) to the effect that no jury issue is made out if reasonable men could not reach differing conclusions.

In the case at bar Dr. Leigh was by every test the classical example of the true independent contractor for whose negligence the Respondent would not be liable. There is not a scintilla of evidence of any right of the Respondent to control his acts, his treatment or his judgment. All the material evidence is to the contrary. He was in all respects a private practitioner called in by the railroad to treat an employee at the company's expense, the only modification being that the cumbersome burden of payment for each individual service had been alleviated by an arrangement for a regular monthly stipend of $125. Under these facts no reasonable man could conclude that Respondent had the right of detailed control over the diagnosis, treatment and judgment rendered by Dr. Leigh, and the foregoing principles apply as they did in *Metzger v. Western Maryland Ry. Co.*, 30 F. (2d) 50 (C. C. A. 4th, 1929) where it was stated:

> "And we think also, that defendant is not liable under the statute for the negligence of the physician, for the reason that the physician is not an 'officer, agent or employee,' for whose negligence the company is made liable. He is obviously not an officer or agent; but, as he is employed by the company to treat its employees, the question arises whether such employment does not constitute him an employee. We think not. The word 'employee' is used in the statute to designate one within the relationship of master and servant, one whose work is subject to the order and control of the company, not an independent contractor or a physician, who exercises his own judgment free from the company's

> control or supervision. *C.R.I. & P.R. Co.* v. *Bond*, 240 U. S. 449, 36 S. Ct. 403, 60 L. Ed. 735, and see *Quinn* v. *Kansas, etc. R. Co.*, 94 Tenn. 713, 30 S.W. 1036, 28 L.R.A. 552, 45 Am. St. Rept. 767; *Union Pac. R. Co.* v. *Artist* (C.C.A. 8th) 60 F. 365; *Pearl* v. *West End Street Ry. Co.*, 176 Mass. 177, 57 N.E. 339, 49 L.R.A. 826, 79 Am. St. Rep. 302 (opinion by Holmes, C.J.); *Powers* v. *Mass Hom. Hospital*, (C.C.A. 1st) 109 F. 294, 298 (65 L.R.A. 372); *Ill. Cent. R. Co.* v. *Moodie*, (C.C.A. 5th) 23 F (2d) 902."
>
> 30 F. (2d) 50, 51

In this conclusion, Respondent does not mean to suggest any impossibility of the existence of circumstances in other case requiring the application of the doctrine of respondeat superior where a physician is involved. Respondent does not argue with this Court's ruling in the case of *DeZon* v. *American President Lines*, 318 U. S. 660 (1943) where under its facts the ship's doctor was found as a matter of law to be an employee. As stated on page 668, he was "not in his own or the seaman's control; he was an employee and as such subject to the ship discipline and the master's orders". Furthermore, that physician in treating the seaman was, as this Court emphasized, engaged in the shipowner's business and discharging the ship's absolute duty "to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship". (page 667). There exists no such duty upon a railroad company. *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367 (1932); *Lanni* v. *Wyer*, 219 F. (2d) 701 (C. A. 2nd, 1955). In addition, the Court pointedly called attention to the fact that the physician "was not an independent practitioner, called to treat one whose expenses the ship agreed to make good", (Page 668), which, except for the method of payment, precisely defines the position of Dr. Leigh in the case at bar.

This Court on this review need not be concerned with other cases cited by Petitioner which are illustrative of circumstances justifying the conclusion that the physicians there involved were subject to the detailed control of their companies. Their facts are so foreign to the case at bar as to be of no usefulness here. Typical among them is the district court decision *O'Donnell v. Penna. Ry. Co.*, 122 F. Supp. 899 (S. D. N. Y., 1954) where the facts were that:

> "The railroad maintained a complete medical staff including supervisory personnel. There was testimony that the doctor took general orders or instructions from superiors, that his superior might make recommendations or suggestions about medical treatment, and that if his superior saw him using poor medical technique he would take exception or ask him to stop. In other respects, there can be no doubt that the physician was an employee of the railroad. He had a social security number, a service record, a wage record disclosing the regular payment of periodic wages, and he worked regular hours. The plaintiff did not select the doctor himself; he was instructed to consult him, over his own objection."
>
> 122 F. Supp. 899, 902.

In the case at bar Petitioner was free to choose his own doctor if he so desired and this he did after his initial treatment at his company's expense. The railroad did not maintain any medical staff. Dr. Leigh took no orders from any railroad personnel nor did the railroad exercise any control over his treatment of patients. He had no social security, withholding tax or railroad retirement arrangements with the company. He kept his own hours; maintained his own private practice in his own office with his own employees and equipment, none of which was furn-

ished or in any manner confrolled by the company. The lower court was clearly right in holding as a matter of law that the railroad was not liable for any acts of Dr. Leigh.

No Evidence of Negligence of Physician:

The crux of Petitioner's claim for alleged malpractice is that the physician of unquestioned qualifications engaged by Respondent treated and advised Petitioner in accordance with his medical judgment that strapping and light use of the foot constituted the best treatment. Having so treated Petitioner from July 3, 1957, the date of his injury, to July 20, 1957, the physician advised Respondent, upon inquiry, that he felt Petitioner could do light work not involving climbing cars. Petitioner returned to work for a week. His foot continued hurting, so he consulted his own physician, Dr. Thiemeyer. There was no evidence that this physician did anything more to Petitioner's foot than did Dr. Leigh, but his advice differed in that he instructed Petitioner not to use the foot. Petitioner's foot was sufficiently healed for him to return to regular work on September 1, 1957.

On the testmony of his physician that "It is my opinion that a fracture should be immobilized . . ." (R. 29), and that "I would say . . ." that early ambulation would aggravate the injury and retard healing (R. 29), Petitioner seeks a recovery for negligence on the part of Dr. Leigh. In this theory, Petitioner's counsel overlooks the fact that he has not offered any proof that Dr. Leigh's judgment in this respect was in error, nor that such judgment, even if erroneous, was negligent. In the first place, one does not prove error by mere proof of conflicting medical opinon, and neither court nor jury can properly attempt to determine in the absence of evidence that either theory is not

founded on sound medical knowledge nor that either theory is rejected among average competent practitioners in that community. *Baldor v. Rogers*, (Fla.) 81 So. (2d) 658, 55 ALR (2d) 453 (1955). Even more obvious is the point that even if Dr. Leigh's judgment is assumed to be erroneous, this fact does not constitute any evidence of negligence. The rule is fundamental, and is stated as follows in 41 Am. Jur., Physicians and Surgeons, Section 103:

> "If a physician brings to his patient care, skill, and knowledge, he is not liable to him for damages resulting from a bona fide error of judgment of which he may be guilty. The law requires a physician to base any professional decision he may make on skill and careful study and consideration of the case, but when the decision depends on an exercise of judgment, the law requires only that the judgment be bona fide. A physician is not an insurer of the correctness of his judgment. Especially is this true in cases of doubt or where competent medical authority is divided, and the physician in question follows a course of treatment advocated by a substantial number of competent physicians in good standing in his community."

As this Court stated in *DeZon v. American President Lines*, 318 U. S. 660, 671 (1943), the mere fact that a doctor made a wrong diagnosis does not prove that it was a negligent one, and (page 672) it is not this Court's function to read "into the law a theory, however disguised, that a physician who undertakes care guarantees cure, and that each unsuccessful effort of the physician may be visited with a successful malpractice suit."

To support a verdict there must be expert medical testimony that the physician failed to possess or exercise that degree of diligence and skill which is common to and exercised by the average member of the profession in good standing in similar localities in the same general line of practice. *Henley v. Mason*, 154 Va. 381, 153 S. E. 653 (1930). There was a total absence of such evidence in the case at bar. For this reason also the trial court was compelled to strike the evidence of Petitioner on this count.

CONCLUSION

Respondent respectfully submits that the trial court was plainly right in striking Petitioner's evidence and entering summary judgment for Respondent on the grounds that there was no evidence of any negligence on the part of Respondent or imputable to it which caused or contributed to Petitioner's fall and resulting injury. The judgment should be affirmed.

W. R. C. Cocke
Thomas R. McNamara
Williams, Cocke, Worrell & Kelly
322 Citizens Bank Building
Norfolk 10, Virginia,
Counsel for Respondent.